Dialogue of the Courts in Europe: Interactions between the European Court of Human Rights, the Court of Justice of the European Union and the Courts of the ECHR Member States

Dissertation

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ABSTRACT

In light of the growing need to establish a coherent relationship between the European Court of Human Rights, the Court of Justice of the European Union and the courts of the ECHR member states, this study explores the challenges of jurisdictional competition that undermine the credibility of the courts and weaken the effectiveness of judicial protection of fundamental rights in Europe, and suggests ways to reduce emerging judicial tensions between these courts. It examines how to avoid inconsistencies in judicial practices of the European and national courts, how to approach accession of the EU to the ECHR, and how to ensure effective functioning of the pilot judgment mechanism and national judicial review procedures. It concludes that in order to coordinate cooperation between the courts it is important to strengthen their interactions through adhering to best practices at all levels. To pursue deeper integration of states into the European and international community and minimise the chance of rendering contradicting judgments by the courts, member states are expected to comply faithfully with their obligations under EU law and the ECHR, and the European courts shall exclude the possibility of encroachment on state sovereignty. Only if mutually agreed solutions are adopted will a greater consistency in their case law be achieved and a uniform system of protection of human rights ensured.

Keywords: European Convention on Human Rights, European Court of Human Rights, Court of Justice of the European Union, German Federal Constitutional Court, Russian Constitutional Court, EU accession to the ECHR, margin of appreciation, European consensus, judicial cooperation, pilot judgment procedure

ZUSAMENFASSUNG

Aufgrund des wachsenden Bedarfs an kohärenter Interaktion zwischen dem Europäischen Gerichtshof für Menschenrechte, dem Gerichtshof der Europäischen Union und den Gerichten der EMRK-Mitgliedstaaten, untersucht diese Arbeit die Problematik von Kompetenzkonflikten, die die Glaubwürdigkeit der europäischen und nationalen Gerichtshöfe untergraben und die Effektivität des gerichtlichen Rechtsschutzes in Europa schwächen, und schlägt die Lösungen vor, um Rechtsprechungskonflikte zwischen den Gerichtshöfen zu verringern. Es erfolgt eine Betrachtung der Fragen, wie Inkonsistenzen der gerichtlichen Rechtsprechung der europäischen und nationalen Gerichte vermieden werden können, wie der Beitritt der EU zur EMRK angegangen werden kann und wie das Piloturteilsverfahren des EGMR und nationalen gerichtlichen Überprüfungsverfahren wirksam funktionieren kann. Die Arbeit kommt zu dem Schluss, dass es für die Koordination der Zusammenarbeit zwischen den Gerichten wichtig ist, ihre Interaktionen zu verstärken, indem bewährte Verfahren auf allen Ebenen ausgetauscht werden. Um eine tiefere Integration der Staaten in die europäische und internationale Gemeinschaft zu erreichen und das Risiko von sich widersprechenden gerichtlichen Entscheidungen zu reduzieren, wird von den Mitgliedstaaten erwartet, dass sie ihre Verpflichtungen aus dem EU-Recht und der EMRK verlässlich erfüllen, und die europäischen Gerichtshöfe werden ihrerseits die Möglichkeit eines Eingriffs in die Souveränität der Staaten ausschließen lassen. Nur wenn einvernehmlich beschlossene Lösungen angenommen werden, wird eine größere Kohärenz in Rechtsprechung der europäischen und nationalen Gerichtshöfe erreicht und ein einheitliches System zum Schutz der Menschenrechte gewährleistet.

Schlagwörter: Europäische Menschenrechtskonvention, Europäischer Gerichtshof für Menschenrechte, Gerichtshof der Europäischen Union, Bundesverfassungsgericht, Verfassungsgericht der Russischen Föderation, EU-Beitritt zur EMRK, Ermessensspielraum, europäischer Konsens, gerichtliche Kooperation, Piloturteilsverfahren

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LIST OF ABBREVIATONS

AJIL	American Journal of International Law
APK	Arbitrazhny Protzessualny Kodeks (Arbitration Procedure Code)
ATC	Auto del Tribunal Constitucional (Order of the Constitutional Court)
AZ	Aktenzeichen (reference number)
BGB	Bürgerliches Gesetzbuch (Civil Code)
BGBl	Bundesgesetzblatt (Federal Law Gazette)
BOE	Boletin Oficial del Estado (Official State Gazette of Spain)
BvR	Verfassungsbeschwerden (constitutional complaints)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BVerfGE	Entscheidung des Bundesverfassungsgerichts (decision of the Federal Constitutional Court)
BVerfGG	Bundesverfassungsgerichts-Gesetz (Federal Constitutional Court Act)
B-VG	Bundes-Verfassungsgesetz (Federal Constittutional Law)
CDDH	Steering Committee for Human Rights
CDL	Commission for Democracy through Law
CETS	Council of Europe Treaty Series
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CIS	Commonwealth of Independent States
CM	Committee of Ministers
CoE	Council of Europe
CD	Collection of Decisions of the Commission
COM	Commission
DAA	Draft Accession Agreement
DR	Decisions and Reports of the Commission
DzU	Dziennik Ustaw Rzeczypospolitej Polskiej (Official Journal of the Republic of Poland)
EC	European Community
ECR	European Court Reports
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights

EEA	European Economic Area
EEC	European Economic Community
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
EPO	European Patent Office
ERA	Europäische Rechtsakademie (European Law Academy)
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
EuGRZ	Europäische Grundrechte Zeitschrift (European Fundamental Rights Journal)
FamRZ	Zeitschrift für das gesamte Familienrecht (Family Law Journal)
FAZ	Frankfurter Allgemeine Zeitung (Frankfurt General Newspaper)
FCC	Federal Constitutional Court
FZ	Federalny Zakon (Federal Law)
FKZ	Federalny Konstitutzionny Zakon (Federal Constitutional Law)
GC	Grand Chamber
GPK	Grazhdansky Protzessualny Kodeks (Civil Procedure Code)
GVBl	Gesetz – und Verordnungsblatt (Legal and Administrative Gazette)
HUDOC	Human Rights Documentation
HRW	Human Rights Watch
ICLJ	International Criminal Law and Justice
ILC	International Law Commission
ILO	International Law Organisation
LGBl	Landesgesetzblatt (Official Journal)
NJW	Neue Juristische Wochenschrift (German Law Journal)
HFR	Humboldt Forum Recht
HRLJ	Human Rights Law Journal
HRLR	Human Rights Law Reports
MLR	Modern Law Review
NVwZ	Neue Zeitschrift für Verwaltungsrecht (New Journal on Administrative Law)
NZA	Neue Zeitschrift für Arbeitsrecht (New Journal of Labour Law)
OJLS	Oxford Journal of Legal Studies
OLG	Oberlandesgericht (Higher Regional Court)

OOPEC	Office for Official Publications of the European Communities
OTK	Trybunał Konstytucyjny orzeczenie (decision of the Polish Constitutional Tribunal)
PACE	Parliamentary Assembly of the Council of Europe
PJP	Pilot Judgment Procedure
poz	pozycja (number)
RCC	Russian Constitutional Court
RG	Rossiskaya Gazeta (Official Gazette of the Russian Government)
RGBl	Reichsgesetsblatt (Reich Law Gazette)
SG	Secretary General
St	statya (article)
Stb	Staatsblad (Official Law Gazette of the Netherlands)
StPO	Strafprozessordnung (Code of Criminal Procedure)
STC	Sentencia Tribunal Constitucional (Judgment of the Spanish Constitutional Court)
SZ RF	Sobranie Zakonodatelstva Rossikoy Federatzii (Collection of the Legislative Acts of the Russian Federation)
TASS	Telegrafnoe Agentstvo Sovetskogo Soyuza (Russian News Agency)
TC	Tribunal Constitucional (Constitutional Court of Spain)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TK	Trybunał Konstytucyjny (Polish Constitutional Tribunal)
UKSC	United Kingdom Supreme Court
UN	United Nations
UNTS	United Nations Treaty Series
UPK	Ugolovno-protzessualny Kodeks (Criminal Procedure Code)
ÚS	Ustavni Soud (Constitutional Court of Czech Republic)
VfGH	Verfassungsgericht (Constitutional Court of Austria)
VR	Verkhovna Rada (Supreme Council of Ukraine)
VS	Verkhovniy Sovet (Supreme Council)
VwGH	Verwaltungsgerichtshof (Administrative Court)
VS RSFSR	Supreme Soviet of the Russian Soviet Federative Socialist Republic
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Journal for Comparative Public Law and International Law)
ZPO	Zivilprozessordnung (Civil Procedure Code)

CONTENTS

INTRODUCTION

'The Council of Europe and the European Union were products of the same idea, the same spirit and the same ambition. They mobilised the energy and commitment of the same founding fathers of Europe'[1].

-Jean-Claude Juncker.

In the aftermath of World War II, which dramatically affected the economy of Europe, the political system and society itself, the need to avoid a repeat of this tragedy was evident.[2] The lessons learned from WWII have provided the basis for the near-simultaneous formation of a number of organisations. First was the Council of Europe (CoE) in 1949,[3] intended to promote the cooperation between countries in the area of human rights with the aims of enhancing democracy and preventing further crimes against humanity.[4] Then came the European Coal and Steel Community (ECSC) in 1951,[5] which was intended to create a strong and stable economic unity of member states.[6] In order to give effect to those values enshrined in the CoE's first treaty, the European Convention on Human Rights of 1950 (ECHR),[7] and in the Treaty of Paris establishing the ECSC of 1951, unique institutional mechanisms were established within the framework of their structures. Europeans saw the birth of the Court of Justice of the ECSC in 1952,[8] and of the European Court of Human Rights (ECtHR or Strasbourg Court) in 1959. To contribute to the strengthening of human rights protection and the economic integration, the member states, by ratifying these treaties, agreed to transfer a

1 Jean-Claude Juncker, 'Council of Europe-European Union: A Sole Ambition for the European Continent', Report to the Attention of the Heads of State or Government of the Member States of the Council of Europe (11 April 2006) 1.

2 Philip D Grove, Mark J Grove and Alastair Finlan, *The Second World War: The War at Sea* (Osprey 2002) 75.

3 Statute of the Council of Europe (opened for signature 5 May 1949, entered into force 3 August 1949) CETS No 001; Arthur Henry Robertson and J G Merrils, *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd edn, Manchester UP 1993) ch 1.

4 Florence Benoît-Rohmer and Heinrich Klebes, *Council of Europe Law: Towards a Pan-European Legal Area* (Council of Europe Publishing 2005) 20-21.

5 Treaty of Paris establishing the European Coal and Steel Community (opened for signature 18 April 1951, entered into force 23 July 1952) 261 UNTS 140.

6 Derek Howard Aldcroft and Steven Morewood, *The European Economy Since 1914* (5th edn, Routledge 2013) 342.

7 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 11 and No 14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No 005.

8 This institutional body being constituted in 1952 as the Court of Justice of the ECSC was known since 1958 as the Court of Justice of the European Communities or the European Court of Justice (ECJ), and since 2009 when the Treaty of Lisbon entered into force was recognised as the Court of Justice of the European Union (CJEU) (Article 19). The terms 'ECJ', 'CJEU' are used interchangeably throughout the thesis, depending on whether the author referred to the past 'ECJ', or to the the current 'CJEU'.

part of their sovereignty to these organisations and to be subject to compulsory jurisdiction of these European courts.[9]

As soon as the commitment of the Court of Justice to promote the fundamental rights became obvious, this judicial institution, having started to resolve human rights disputes, was heavily criticised on the basis that it could not deliver judgments going beyond the competences envisaged by the Treaties. As far as the ECtHR was concerned, it was observed that this judicial institution has gradually broadened those entrusted to it powers at the cost of reducing the sovereignty of the contracting parties to the ECHR.

The exercise of such extended competences by the two European judicial institutions, which were viewed by Andreas Voβkuhle as European 'constitutional courts',[10] subsequently resulted in jurisdictional clashes between the courts in resolving human rights cases.[11] Thus, the idea of consolidating those areas – the national, that of the European Union (EU),[12] and that of the ECHR – within the framework of the common European system for the protection of fundamental rights was important for maintaining the stability of their legal orders.

Given the complex nature of emerged conflict situations between the courts in Europe, the major focus of this study will be to explore, firstly, the challenges of jurisdictional competition between the CJEU and the courts of the member states, the CJEU and the ECtHR, the ECtHR and the courts of the ECHR member states; secondly, to delineate the limits of the courts' possible interference with each other's jurisdiction; thirdly, to identify the extent to which the courts have managed to establish harmonious relationship, on which points it is still not possible to find a consensus, and, ultimately, under what conditions the courts will be ready to improve their dialogue when adjudicating human rights disputes relating to questions of national law, EU law and the ECHR.

To minimise the chance of rendering contradictory rulings by courts at different levels and

9 Anneli Albi, 'Referendums in the CEE Candidate Countries: Implications for the EU Treaty Amendment Procedure' in Christophie Hillion, *EU Enlargement: A Legal Approach* (Hart Publishing 2004) 63.

10 Andreas Voβkuhle, 'Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*' (2010) 6 Eu Const L Rev 175, 176.

11 Lech Garlicki, 'Cooperation of Courts: The Role of Supranational Jurisdiction in Europe' (2008) 6 Intl J of Const L 509 cited in Alec Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court', *Faculty Scholarship Series*. Paper 71 (2009) 13.

12 Since this study touches on the period starting from the birth of the European Economic Community (EEC) till its transformation into the European Community (EC) and the current European Union (EU), these terms will be used interchangeably to describe the whole enterprise.

achieve uniform standards of human rights protection it is thus important to scrutinise how 'the multilevel cooperation of the European constitutional courts'[13] is currently sustained, and the CJEU's and ECtHR's jurisprudence is accommodated in the legal systems of the member states.

The study is divided into three main chapters that correspond to the research objectives as follows. First of all, by analysing judicial practices of the CJEU and of the courts of the member states it evaluates the evolving nature of their relationship in resolving the conflicts between national law and EU law, and scrutinises whether the national courts recognise the supremacy of EU law. The author examines the functioning of those mechanisms that were elaborated by member states to safeguard the fundamentals of their constitutional orders. To understand how the balance between the German Federal Constitutional Court (FCC) and the CJEU is maintained, the study looks closely at the rationale behind the fundamental rights review, *ultra vires* review, and constitutional identity review. The author addresses the questions of how legally justified could be the exercise by national judiciary of these review powers that would allow the state to deviate from its obligation to comply with EU law, and how this correlates with the commitment undertaken by a state to promote European integration.

Secondly, the study examines the cooperation between the ECtHR and the CJEU in handling human rights disputes. In light of the fact that over time the Court of Justice has 'evolved from being a tribunal concerned primarily with economic matters to one with a much wider range of jurisdiction which is now explicitly tasked with enforcing human rights',[14] it was clear that a parallel judicial protection of fundamental rights in both the CoE and the EU might lead to a risk of creating double standards within the frame of a single European legal space.[15] Bearing this in mind, what would have to be done next would be to evaluate the progress in negotiations for accession of the EU to the ECHR, the idea of which emerged almost four decades ago when the Court of Justice became more and more involved in the resolution of human rights cases. The study will scrutinise the CJEU's Opinion 2/13[16] on the

13 Voβkuhle (n 10) 178.

14 Gráinne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht J Eur & Comp L 68, 171.

15 Concurring Opinion of Judge Ress, and Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki in *Bosphorus v Ireland* [2005] ECHR 440, para 2; For the discussion on 'double standards' see, eg, Kathrin Kuhnert, 'Bosphorus — Double Standards in European Human Rights Protection?' (2006) 2 Utrecht L Rev 177.

16 Opinion 2/13 Accession by the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2015] OJ C 65/C.

incompatibility of the Draft Accession Agreement with the EU Treaties and discuss how the anticipated accession might affect the jurisdictional relationship between the ECtHR and the CJEU. Due to remaining obstacles on the path to accession that still have to be overcome, the author will analyse the legitimacy of applied currently by the ECtHR the equivalent protection doctrine aimed at maintaining a balanced relationship between the EU and the ECHR legal systems, and attempts to provide suggestions on how to avoid jurisdictional overlaps between these courts after EU accedes to the Convention.

The third challenging issue to be addressed deals with those tensions that occur in the interactions between the ECtHR and the courts of the ECHR member states. The author explores the reception of the ECHR in the domestic legal orders and discusses the status of judgments of the Strasbourg Court in the hierarchy of sources of law within legal systems of the Federal Republic of Germany, the Russian Federation and the Republic of Poland. The study will address the controversial issue of how to resolve the conflict situations between the courts when the execution of the ECtHR's judgments by the contracting parties that have agreed under Article 46(1) of the Convention to abide by a final judgment of the Court may encroach on their sovereignty.

Given that those tensions between the courts have increased, particularly in light of the fact that the ECtHR in departing from its primary mission to adjudicate individual cases has shifted its focus to a more abstract review of the Convention provisions by identifying the structural problems in the national legal orders of the member states, the study will reflect on the process of constitutionalisation of the Strasbourg Court. It will analyse the nature of the newly established mechanism of the pilot judgment procedure that was designed to address the systemic problems revealed by the ECtHR at the national level, and the attitudes of the member states towards enforcement of pilot judgments in their legal systems. Having examined the legitimacy of this procedure, the author will argue that in view of those powers that the ECtHR started to exercise in its delivered pilot judgments, the application of the pilot judgment procedure gives rise to concerns about its effectiveness not only in handling the ECtHR's caseload, but in protecting the fundamental rights of individuals.[17]

The study suggests an alternative solution to a growing number of systematic cases at the

17 Discussion following the presentation by Luzius Wildhaber 'Pilot Judgments in Cases of Structural or Systematic Problems on the National Level' in Rüdiger Wolfrum and Ulrike Deutsch (eds), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solution* (Springer 2007) 80.

ECtHR, which is focused on improving the effectiveness of the domestic judicial protection. This approach aimed at minimising the negative consequences of the ECtHR being overloaded with complaints that indicate the existence of a structural problem may assist in decreasing the probability of the ECtHR rendering new pilot judgments and would reassure individuals that violations of their rights and freedoms guaranteed by the Convention could be rectified at the national level. The author seeks to encourage member states to end systematic abuses of fundamental rights through being involved in a comprehensive way in the adoption of stronger laws that would be compatible with the ECHR and EU law, bringing about relevant changes to national legislation and long-standing practices in light of the case law of the ECtHR, and reviewing their legal systems regularly regarding the availability and effectiveness of domestic legal remedies to avoid repetitive cases being brought before the ECtHR. The dissertation is presented as follows.

Chapter I describes the development of cooperation between national and European courts. It highlights through the analysis of the relevant case law of the CJEU the gradually changing nature of its competences that were expanded to cover cases of human rights violations. The chapter attempts to define to what degree such an extensive authority of the CJEU corresponds to the jurisdiction of the courts of the member states, on the one hand, and of the ECtHR, on the other hand.

In approaching these issues, it firstly discusses the collaboration between the CJEU and the national judiciary in the context of various review mechanisms elaborated by the FCC for the purpose of preserving the state's sovereignty. Secondly, it observes the relationship between the CJEU and the ECtHR from the view of application of the equivalent protection doctrine. Finally, it explores future perspectives of the two judicial institutions' interactions in light of ongoing negotiations on accession of the EU to the ECHR.

Chapter II addresses the main difficulties that occur in interactions between the ECtHR and the courts of the ECHR member states, particularly the FCC and the Russian Constitutional Court. It investigates the extent to which contracting parties adhere to their obligations under the Convention. The chapter suggests how to improve the cooperation between the courts in order to diminish jurisdictional tensions between them in implementing the judgments of the ECtHR that may threaten the constitutional principles of national legal orders.

In face of increasing number of conflict situations between the courts, the chapter examines

the application of the margin of appreciation doctrine and the European consensus concept by the ECtHR, draws attention to the need to eliminate several shortcomings in the use of these techniques in the jurisprudence of the Court, and provides recommendations for enhancing the acceptability of its judgments by the member states.

Chapter III investigates the current trends of the constitutionalisation of the ECtHR. In an attempt to define whether the Strasbourg Court goes far beyond its original role of ensuring individual justice, it focuses on exploring the legitimacy of the pilot judgment procedure introduced by the ECtHR as a response to the growing number of repetitive cases. In scrutinising the impact of the pilot judgments on the legal systems of Poland, Germany and Russia, the chapter highlights the major drawbacks of this mechanism that result from its insufficient regulation. In view of this, the chapter intends to call on the member states to enhance the effectiveness of the domestic judicial mechanisms capable of redressing the infringements of rights and freedoms guaranteed by the ECHR at the national level. By accentuating the need to secure, on the one hand, the sovereignty of the contracting parties to the Convention, and to preserve, on the other hand, the subsidiary character of the Convention control mechanism in the resolution of cases of human rights violations, the chapter demonstrates the ways to advance cooperation between the international and national legal orders in the process of enforcing the judgments of the ECtHR.

Based on presented in the dissertation findings, the study concludes that such complex interconnections between analysed national, supranational and international courts require a more comprehensive coordination. It ends with suggestions for further strengthening the commitments of all actors involved in this dialogue, namely the CJEU, ECtHR and the courts of the ECHR member states, for avoiding potential jurisdictional overlaps and intensifying judicial interactions at different levels. Those recommendations for improvement of the observed relationship between the courts will presumably contribute to theoretical and practical debates among the European and national judiciary, policy-makers and academics on promoting effective judicial protection of fundamental rights in Europe.

METHODOLOGY

'No study deserves the name of science if it limits itself to phenomena arising within its national boundaries',[18]

-Konrad Zweigert, Hein Kötz.

To determine the degree of cooperation between the CJEU, the ECtHR and the courts of the ECHR member states, the use of the comparative law for the purposes of this study is important. By means of juxtaposing those approaches cultivated by these courts, operating in a multilevel system, in interpreting the fundamental rights provisions, and by highlighting convergences and divergences across their judicial practices, it will facilitate the search for solutions necessary to improve this judicial dialogue and to ensure the courts' coordinated operation in a long-term perspective.

Given that the discrepancies occurring in the jurisprudence of the examined courts when adjudicating cases on fundamental rights may create double standards in human rights protection in Europe,[19] a comparative analysis would suggest how to harmonise the courts' case law, change the legal policies in national legal orders and reshape the attitudes of national authorities towards establishing a more cooperative atmosphere necessary for effective enforcement of the European courts' judgments.

In search of the ways for regulating jurisdictional tensions between the courts at different levels, this study will make use of case studies, which according to Ernst Rabel might advance the process of finding the best suitable solutions that have already been used in other legal systems.[20] Employing this approach will assist in identifying those mechanisms by means of which a balance between the courts in divergent constitutional orders could be sustained, make it possible to develop recommendations to prevent the emergence of conflicts between them, and demonstrate how these judicial institutions can learn from each other in resolving fundamental rights issues. It is thus important to scrutinise the case law of these courts in a historical perspective, as this may throw light on how their relationship evolved, uncover the

18 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (2nd edn, Clarendom Press 1998) 14.

19 Yutaka Arai - Takahashi, *The Margin of Appreciation and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2001).

20 Ernst Rabel, *Das Recht des Warenkaufs* [The Law on Sale of Goods] (De Gruyter 1938) 67; Zweigert and Kötz (n 18) 8, 16.

main challenges that the courts were confronting over years in the interpretation of fundamental rights provisions, and outline perspectives of their collaboration. This is particularly significant for defining areas requiring the promotion of coherent policies in the courts' jurisprudence.

To examine the nature of the relationship between judicial institutions in Europe, this study will rely on functional method, which, as asserted by Konrad Zweigert and Hein Kötz, is 'the basic methodological principle of all comparative law'.[21] The courts under consideration will be regarded as functionally comparable judicial institutions[22] which are adjudicating cases by interpreting fundamental rights consolidated in EU law, the ECHR and national legislation[23]

The comparative analysis of the European and national ways of adjudication of fundamental rights issues will illustrate that, despite divergent approaches applied by the ECtHR, the CJEU and the courts of the ECHR member states, the models of conflict resolution adopted by these judicial institutions in respect of arising jurisdictional clashes are equivalent.[24] According to Ralf Michaels, this presumption that 'practical results are similar',[25] being a 'necessary element of functionalist comparative law',[26] makes it clear that by responding in the same way to emerging jurisdictional problems at different levels the courts are striving to avoid challenges of jurisdictional competition.

Given that both the problems raised in analysed legal orders were identical and the ways of resolving them were equivalent,[27] Michaels has opined that 'there is still strong faith that the similarities between different legal orders […] are […] proof of deeper universal values'.[28] Understanding this functional interdependence between the problems and solutions is central to the process of reducing possible inconsistencies in judicial practices of the courts and building harmonious cooperation that would meet the expectations of all actors involved in

21 Zweigert and Kötz (n 18) 31.
22 Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 370.
23 Vosskuhle (n 10) 185; on constitutional pluralism see, eg, N MacCormick, 'Beyond the Sovereign State' (1993) 56 MLR 1; N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317.
24 Giuseppe Martinico and Oreste Pollicino, *The Interaction Between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (Edward Elgar 2012) 17; Giuseppe Martinico and Filippo Fontanello, 'The Hidden Dialogue: When Judicial Competitors Collaborate' (2008) 8 (3) Global Jurist 1.
25 Zweigert and Kötz (n 18) 40.
26 Michaels (n 22) 370.
27 Zweigert and Kötz (n 18) 44-45.
28 Michaels (n 22) 360; see, 'the solutions are deemed inherent in problems' in Josef Esser, *Grundsatz und Norm in der richterlichen Rechtsfortbildung des Privatrechts* [Principle and Norm in Judicial Development of Private Law] (Tübingen 1956) cited in Michaels (n 22) 346.

the dialogue. It is therefore important, firstly, to examine functional connections between the CJEU and the courts of the member states, attaching particular attention to the practice of the FCC. This is because Germany, as a founding member state of the European Economic Community (EEC), plays a central role in the European integration process[29] and 'provides a first level of human rights protection' by means of existing differentiated system of judicial review complemented by a 'powerful mandate' of the FCC.[30] To develop this argument, the study will turn to the analysis of the following relevant to the debate cases: *Solange I,*[31] *Solange II,*[32] *Maastricht,*[33] *Lisbon*[34] and *Melloni.*[35] In view of complex interface between national and supranational legal systems, such a selection of cases is driven by their constitutional significance to balancing contradictions arising between the courts in their judicial practices.

Secondly, the analysis of interactions between the CJEU and the ECtHR will reflect on the evolution of their relationship in adjudicating cases on fundamental rights. It addresses those conflicting situations in which member states had to derogate from their obligations under the Convention to comply with their commitments under EU law and scrutinises the cases *Matthews v United Kingdom*[36] and *Bosphorus v Ireland*,[37] which highlight how currently the jurisdictional tensions between the CJEU and the ECtHR are avoided.

Thirdly, when examining the relationship between the ECtHR and the national judiciary the study discusses those cases in which the courts confront each other in the growing light of occurring divergencies in their interpretation of fundamental rights. By comparing the legal systems of the Federal Republic of Germany, the Russian Federation and the Republic of Poland in terms of compliance with the obligations stemming from the ECHR, the analysis of the following ECtHR's outstanding decisions in *Von Hannover v Germany*,[38] *Görgülü v Germany*,[39] *Markin v Russia*,[40] *Anchugov and Gladkov v Russia*,[41] *Broniowski v Poland*,[42]

29 Simon Bulmer, 'Germany and Constitutional Politics' in Maurizio Carbone (ed), *National Politics and European Integration: From the Constitution to the Lisbon Treaty* (Edward Elgar 2010) 53.
30 Sebastian Müller and Christoph Gusy, 'The Interrelationship between domestic judicial mechanisms and the Strasbourg Court rulings in Germany' in Dia Anagnostou (ed), *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (Edinburgh UP 2013) 27, 30.
31 BVerfGE 37, 271 [1974] 2 CMLR 540 (*Solange I)*.
32 BVerfGE 73, 339 [1987] 3 CMLR 225 (*Solange II)*.
33 BVerfGE 89, 155 [1994] 1 CMLR 57 (*Maastricht)*.
34 BVerfGE 123, 267 [2010] 3 CMLR 276 (*Lisbon)*.
35 BVerfG, 2 BvR 2735/14 (15 December 2015) NJW 2016, 1149 (*Melloni*).
36 *Matthews v United Kingdom* [1999] ECHR 1999-I.
37 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* [2005] ECHR 2005-VI.
38 *Von Hannover v Germany* [2004] ECHR 2004-VI.
39 *Görgülü v Germany* [2004] ECHR 89.

Rumpf v Germany,[43] *Burdov v Russia (no 2)*[44] and corresponding national judicial practice will reveal a homogeneity of attitudes between the domestic courts as regards the impact of the ECtHR's judgments on the national legal systems.

The study will illustrate that the model of relationship between the CJEU and the courts of the member states is guided by the *Solange* doctrine that was established for the purpose of minimising possible judicial tensions. It served as a basis for the ECtHR developing the equivalent protection doctrine necessary to preserve the exclusive authorities of the ECtHR and the CJEU, and to thwart potential jurisdictional conflicts between them. It also contributed to the regulation of the relationship between the ECtHR and the national judiciary, which is analysed in the context of *Görgülü* and *Markin* cases. The *Solange* doctrine represents a specific tool for solving the problems of jurisdictional competition which, according to Nikolaos Lavranos, allows the courts to delineate the sphere of their 'reserved jurisdiction' with respect to another authorised judicial power.[45] Adhering to this approach will make it possible to avoid contradictory judgments, and substantially decrease the risk of fragmentation of fundamentals rights across Europe.[46]

Due attention must be given to the member states selected for the purposes of this study. Germany was among the first countries to ratify the ECHR and to recognise the jurisdiction of the ECtHR; it has a long history of collaboration with this international mechanism. The FCC's jurisprudence, having gained credibility among other states, was perceived as a model for the development of constitutional justice in Europe.[47] It is therefore significant to determine the extent to which its partnership experience acquired during this period might be valuable to those contracting parties to the Convention, as the Russian Federation and the Republic of Poland, which not only lack sufficient incentives to strengthen the cooperation between their national judiciaries and the ECtHR, but need to overcome certain challenges in their legal systems for building harmonious relationship in the future. Apart from that, in view of strong judicial protection of fundamental rights under the German Constitution, it is quite

40 *Konstantin Markin v Russia* App no 30078/06 (ECHR, 7 October 2010).
41 *Anchugov and Gladkov v Russia* App nos 11157/04 and 15162/05 (ECHR, 4 July 2013).
42 *Broniowski v Poland* (GC) [2004] ECHR 2004-V, *Hutten-Czapska* v *Poland* (2006) 42 EHRR 15.
43 *Rumpf v Germany* App no 46344/06 (ECtHR, 2 September 2010).
44 *Burdov v Russia (no 2)* (2009) 49 EHRR 22.
45 Nikolaos Lavranos, 'Towards a Solange-Method between International Courts and Tribunals?' in Yuval Shany, Tomer Broude (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subdisiarity* (Hart Publishing 2008) 219.
46 Nikolaos Lavranos,'The Solange-Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals' (2008) 30(275) Loyola Los Angeles Intl & Comp L Rev 275, 334.
47 Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing 2014) 40.

illustrative that the number of cases in which the ECtHR has acknowledged that Germany violated the provisions of the Convention is relatively low compared to Russia and Poland, which even at the time of ratification of the ECHR did not comply with the requirements of the CoE and had a long way to go towards democracy.[48] Given that it was important to draw lessons from the German legal tradition of securing human rights and to observe 'gaps in the law of one country', which, as argued by Gerhard Dannemann, 'almost like the blind spot […] can be difficult to detect from within',[49] these countries were selected for the present comparative analysis.

By demonstrating how distinct legal traditions, historical development, political environment and length of time in the ECHR regime affect the level of adherence by member states to conventional obligations, it will be accentuated that in those cases where the ECtHR and national courts arrive at different conclusions in their interpretation of fundamental rights, the contracting parties to the Convention have a tendency to adopt similar models of conflict resolution.[50] This will also be explained by the fact that the national courts, when applying international law in their jurisprudence are 'looking abroad for advice'[51] to benefit from the experience of their foreign counterparts that managed to find the best ways of addressing jurisdictional tensions in those challenging cases.

The widespread tendency to refer to the judicial practice of other ECHR member states when it comes to complex constitutional issues was warmly welcomed by Mads Andenas and Duncan Fairgrieve, who argued that 'the existence of a solution in other jurisdiction may under certain circumstances provide persuasive arguments for that solution in one's own jurisdiction'.[52] Transposing other legal orders' solutions to the country under consideration helps not only to support the courts' position, but also increases the responsibility of the national authorities under international and European law as it will be expected to bring about necessary changes to domestic regulations and judicial practices. Antonios Tzanakopoulos emphasised that such an engagement of national courts with the decision of the court of another state may be vital for the 'formation of the judges' understanding and opinions on the

48 Statistics by state 'Violations by Article and by State — 1959-2015 <http://www.echr.coe.int/Pages/home.aspx?p=reports&c=#n1347956587550_pointer> accessed 29 September 2015.

49 Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 416.

50 Michaels (n 22) 370-371.

51 Dannemann (n 49) 410.

52 Mads Andenas and Duncan Fairgrieve, 'Intent on Making Mischief: Seven Ways of Using Comparative Law' in Pier Giuseppe Monateri (ed)*, Methods of Comparative Law* (Edward Elgar Publishing 2012) 51.

interpretation of rules of (international) law'.[53] The use of comparative approach has similarly proved to be a significant tool in the jurisprudence of both the ECtHR and the CJEU, which to identifying how other legal systems addressed similar problems tend to rely in their decision-making on divergent legal sources found at the national, European and international levels.[54]

Through collecting statistical data this study will monitor the effects of those changes made in the national legal systems for compliance with the obligations under ratified treaties. Accumulated statistical information concerning various data such as the number of applications lodged and the number of cases adjudicated by the ECtHR, the number of decisions rendered by the courts of the ECHR member states, the number of cases submitted by national courts to the CJEU for a preliminary ruling procedure, the rate of references made by national judiciary to the EU Charter of Fundamental Rights (EUCFR),[55] the ECHR, the case law of the ECtHR and the CJEU will provide valuable insights regarding the progress and remaining loopholes in cooperation between the national and European judicial mechanisms.

This will also be verified through the prism of economic approach, which for the purposes of this study implies the use of cost-effectiveness analysis.[56] Assessing the economic effect of alternative legal solutions applied in other legal systems to similar problems might have a positive implication for adopting necessary regulations in a given legal order. The central argument here lies in the fact that inefficient legal rules might cause sizable costs on the parties than those that produce favourable outcome. Apparently, this would require member states to undertake complex measures, including bringing their national legislation and judicial practices in line with the European and international standards, in order to reduce costs for the states of removing the negative consequences of such conflicting national regulations and to facilitate the process of building the models of efficiently functioning

53 Antonious Tzanakopoulos, 'Judicial Dialogue as a Means of Interpretation' in Georg Nolte and Helmut Philipp Aust (eds), *Interpretation of International Law by Domestic Courts-Uniformity, Diversity, Convergence* (OUP 2016) 78.

54 The major theoretical contribution to this topic has been made by Monika Ambrus that critically analysed the consistency and transparency of the application of the comparative law in the legal reasoning of the Strasbourg Court, and Sabine Gless and Jeannine Martin who addressed those challenges of applying comparative law in the jurisprudence of both the CJEU and the ECtHR when searching for the common standards either at the national level or within the international legal frame:
Sabine Gless and Jeannine Martin, 'The Comparative Method in European Courts: A Comparison between the CJEU and ECtHR' (2013) 1(1) Bergen J Crim L & Crim Justice 36; Monika Ambrus, 'Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law' (2009) 2(3) Erasmus L Rev 353, 356.

55 EUCFR [2012] OJ C 326/391.

56 Francesco Parisi and Barbara Luppi, 'Quantitative methods in Comparative law' in Pier Giuseppe Monateri (ed)*, Methods of Comparative Law* (Edward Elgar Publishing 2012) 306-307.

judicial institutions.

In sum, the findings of this study will be generated by means of the analysis of primary legal sources; international treaties; EU legislation; normative acts of the ECHR member states; official documents of the UN, the CoE, the EU; statements and reports by human rights organisations; press releases relating to ECtHR judgments; case law of the CJEU, the ECtHR and the judicial practice of the domestic courts; opinions of Advocates General of the CJEU, officials of the CoE and judges sitting at the Strasbourg Court, the CJEU and the courts of ECHR member states; statistical and cost-effectiveness analyses; and interviews with human rights experts, judges and academics within the frame of the scientific conferences organised at the ECtHR in Strasbourg, Human Rights Centre at Ghent University, Max Planck Institute for Comparative Public Law and International Law in Heidelberg and Norwegian Centre for Human Rights at the University of Oslo.

By applying this complex methodological approach, the study will attempt to provide an explanation for revealed divergences in the jurisprudence of the examined judicial institutions, outline the tendencies of convergence in their practices, clarify jurisdictional relationships between them, and give recommendations for the policy-makers on required changes in domestic legal systems to exclude further jurisdictional conflicts and achieve an effective protection of fundamental rights.

LITERATURE REVIEW

The legal literature used to get a better understanding of functional connections between the examined judicial mechanisms will reflect on challenges of accession of the EU to the ECHR; the application of the doctrine of a margin of appreciation in the jurisprudence of the ECtHR; the effects of international law, EU law, the judgments of the European courts on the national legal systems; the application of the equivalent protection doctrine, and the operation of the pilot judgment procedure. Since these problematic issues will be more thoroughly explored within the chapters, some insights into the nature of the problems in the interactions between the courts will already be given at this stage.

Legal scholars have commented extensively on the influence of the CJEU jurisprudence on the national legal systems and the constitutionalisation of the European legal order.[57] By assessing the national responses to the implementation of EU law by member states, academics revealed the challenges of the reception of the supremacy doctrine at the national level,[58] but did not address the ways of overcoming national resistance towards further European integration. The analysis of the development of the judicial dialogue between the Court of Justice and the FCC by Juliane Kokott, Advocate General of the CJEU,[59] shed considerable light on the limits over the transfer of sovereign powers to the EC and the extent to which the FCC guarantees the effective protection of fundamental rights in its legal order, but it falls short of examining those circumstances under which judges may disregard Community law in their practices. Since this is a problem of practical importance, this study will attempt to suggest how to cope with remaining uncertainties as regards relevant solutions to emerging jurisdictional tensions at the supranational and national levels.

This concern has, to a certain extent, been addressed by Mattias Kumm who, in seeking an answer to the question of who has the ultimate authority to affirm the constitutionality of EU acts, introduced an alternative 'common European constitutionalist' approach that shifts the

57 Anne-Marie Slaughter, Alec Stone Sweet and Joseph Halevi Horowitz Weiler, *The European Court and National Courts-Doctrine and Jurisprudence* (Hart Publishing 2000).

58 Herve Bribosia 'Report on Belgium', Jens Plotner 'Report on France', Marta Cartabia 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union', P. Ruggeri Laderchi 'Report on Italy', Monica Claes and Bruno de Witte 'Report on Netherlands', P. P. Graig 'Report on the United Kingdom', Karen Alter 'Explaining National Court Acceptance of European Court Jurisprudence: a Critical Evaluation of Theories of Legal Integration', Walter Mattli and Anna-Marie Slaughter 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints' in Slaughter, Sweet and Weiler (n 57).

59 Juliane Kokott, 'Report on Germany' in Slaughter, Sweet and Weiler (n 57).

debate from the need to determine whether the national courts are allowed to conduct review of secondary Community law to identifying 'what kind of review is constitutionally warranted'.[60] Kumm's compehensive evaluation of the relationship between the CJEU and the courts of the member states helps to focus on elaborating possible modes of conflict resolution to maintain coherent development of the European legal order.

Asteris Pliakos and Georgios Anagnostaras have discussed the exceptional cases of non-compliance with the principle of supremacy of EU law, where it is necessary for the protection of constitutional principles of the member states.[61] Following this approach, the national courts may initiate judicial review of EU normative acts to ascertain whether they are consistent with the fundamental rights incorporated in the national legislation, whether they did not transgress the limits of EU competences, or infringed the national constitutional identity.[62] This could be beneficial for negotiating solutions to future conflicting situations that may arise at the EU and national level, and could also provide the domestic courts with the possibility to assert their understanding of fundamental rights. In contrast to this, Christian Tomuschat has argued that such a strict review of all EU secondary acts might inhibit the integration process.[63] In view of this, Wolfgang Hoffmann-Riem accentuated the need to promote coherence in the case law of these judicial bodies.[64]

By paying considerable attention to those constitutional doctrines that the FCC develops in response to the judicial practice of the European courts, Peter Huber and Andreas Paulus outlined existing obstacles to an overall incorporation of their case law into the German legal system that may impede fulfilment by the state of accepted under international and EU law obligations, [65] but, however, left open the question of how to effectively settle those jurisdictional tensions between the courts that tend to increase in light of their concurrent jurisdiction.

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60 Mattias Kumm, 'Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 CMLR 351, 351.

61 Asteris Pliakos and Georgios Anagnostaras, 'Fundamental Rights and the New Battle over Legal and Judicial Supremacy: Lessons from Melloni' (2015) 34(1) YB Eur L 97.

62 Mehrdad Payandeh, 'Constitutional Review of EU Law after *Honeywell*: Contextualising the Relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48 CMLR 9, 10.

63 Christian Tomuschat, 'Lisbon — Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' (2010) 70 ZaöRV 251, 279-280.

64 Wolfgang Hoffmann-Riem, 'Kohärenz der Anwendung Europäischer und Nationaler Grundrechte' [Coherence in the Application of the European and National Fundamental Rights] (2002) EuGRZ 473.

65 Peter M Huber and Andreas L Paulus, 'Cooperation of Constitutional Courts in Europe: The Openness of the German Constitution to International, European, and Comparative Constitutional Law' in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (1 edn, OUP 2015) 281.

In examining the dynamics of collaboration between the courts at the national, supranational and international levels, the President of the FCC, Andreas Voßkuhle, drew attention to the constitutionalisation of the ECtHR and the CJEU, as they were performing functions that were comparable to those of the FCC.[66] Having analysed the functional interconnections between the European and national legal systems in a hierarchical legal context, he coined the term *Verbund* as characterising the concept of multilevel cooperation of three courts. By scrutinising the effects of the decisions of these European courts in the German legal order, especially in cases dealing with the constitutional organisation of the state, Voßkuhle highlighted the importance of 'sharing of responsibilities between the courts' which would not lead to the reduction, but 'tripling of the fundamental rights protection in the *Verbund* of the constitutional jurisdictions in Karlsruhe, Strasbourg and Luxembourg'.[67]

These ideas were further developed by Charles Sabel and Oliver Gerstenberg, who proposed an interesting solution for resolving jurisdictional clashes between the courts that would require a 'formation of a new order of coordinate constitutionalism in which member states, the ECJ, the European Court of Human Rights and other international tribunals or organisations agree to defer to one another's decisions, provided those decisions respect mutually agreed essentials'.[68] Although considerable attention was given to the analysis of divergent legislative and judicial instruments necessary for achieving coordinated communication between supranational and national courts,[69] legal scholars did not address thoroughly the issue of challenging relationship between the CJEU and the ECtHR,[70] which is particularly important in light of anticipated accession of the EU to the ECHR.[71]

66 Voβkuhle (n 10) 176.

67 ibid 197.

68 Charles F Sabel and Oliver Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16(5) Eu L J 511, 512.

69 Torsten Stein, 'Always Steering a Straight Course? The German Federal Constitutional Court and European Integration' in W Heusel (ed), *A European Law Practitioner, Liber Amicorum John Toulmin* (2011) 12 ERA Forum 219.

70 Christiaan Timmermans, 'The Relationship Between the European Court of Justice and the European Court of Human Rights' in Anthony Arnull and others (eds), *A Constitutional Order of States?* (Hart Publishing 2011) 154.

71 Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 L & Practice of Intl Courts & Tribunals 375, 395; Sonia Morano-Foadi and Stelios Andreadakis, 'A Report on the Protection of Fundamental Rights in Europe: A Reflection on the Relationship between the Court of Justice of the European Union and the European Court of Human Rights Post Lisbon' (Oxford Brookes University 2014) 30; Joseph R Wetzel, 'Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion Between the Luxembourg and Strasbourg Courts' (2003) 71(6) Fordham L Rev 2823, 2848.

Fisnik Korenica attempted to determine the scope of self-restraint that the ECtHR would exercise to preserve the distinctive nature of the EU legal order once the accession is finalised,[72] and discussed those changes that would be required to be adopted to accommodate specific characteristics of the EU's legal system. Doubts were expressed as to whether the Draft Accession Agreement encroaches on the autonomy of EU law.[73] Several scholars have supported the idea that, despite its shortcomings, it has to be renegotiated for authorising accession of the EU to the Convention,[74] however, no clear suggestions were made as to how to safeguard exclusive competences of the CJEU as the guarantor of the Union's legal order.

In contrast to the position of Rincon-Eizaga, who made several arguments in favour of the EU accession to the ECHR which could reduce a number of contradictory interpretations of the ECHR by the CJEU and the ECtHR and guarantee individuals access to judicial mechanisms in Europe, some academics argued that the accession will not assist in converging these legal systems,[75] but have not proposed how the interactions between the courts could be strengthened. Giuseppe Martinico and Oreste Pollicino disputed whether the two European courts have to review their missions,[76] and discussed how to overcome obstacles to invoking EU law and the ECHR by national judiciary, which is apparently important for shaping national policies, but no clear suggestions were made as to how to increase the effective functioning of the European judicial institutions.

Given that with the entry into force of the Lisbon Treaty the EUCFR has obtained mandatory status, and the courts' sphere of influence in deciding human rights cases was considerably affected,[77] this has triggered a controversial reaction within the academic community on the

72 Fisnik Korenica, *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Starsbourg's Credibility on Human Rights Protection* (1st edn, Springer 2015) 434.

73 Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013) 125-126.

74 Lorena Rincon-Eizaga, 'Human Rights in the European Union. Conflict between the Luxembourg and Strasbourg Courts Regarding Interpretation of Article 8 of the European Convention on Human Rights' (2008) 11 Rev Colomb Derecho Int Bogota 119; Olivier De Schutter, 'The Two lives of Bosphorus: Redefining the Relationships between the European Court of Human Rights and the Parties to the Convention' (CRIDHO Working Paper No 6, 2013) 12, 32; Paul de Hert and Fisnik Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights' (2012) 13(7) German LJ 874, 877.

75 Giuseppe Martinico, 'Two Worlds (Still) Apart? ECHR and EU law before National Judges' in Vasiliki Kosta, Nikos Skoutaris and Vassilis Tzevelekos (eds), *The EU Accession to the ECHR* (OUP 2014*)*.

76 Martinico and Pollicino (n 24).

77 Luca Paladini, 'The European Charter of Fundamental Rights After Lisbon: A ''Timid'' Trojan Horse in the Domain of the Common Foreign and Security Policy' in Giacomo Di Federico, *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument Ius Gentium: Comparative Perspectives on Law and Justice* (Springer 2011).

scope of the protection of human rights in the EU.[78] While analysing conflicts, inconsistencies and complementarities between the ECtHR and the CJEU, former President of the Strasbourg Court, Dean Spielmann, reflected on how the binding nature of the Charter and oncoming accession of the EU to the ECHR may assist in reaching common understanding as regards the interpretation of fundamental rights.[79] Giuseppe Martinico and Oreste Pollicino have been arguing in favour of rapprochement between the legal systems of the EU and the ECHR that might lead to a more cooperative relationship between the two courts,[80] but will not, however, exclude a possible emergence of contradictions. Laurent Scheeck observed this collaboration through the prisms of conflict, competition and cooperation. [81] Considering the interdependence of these factors, the proposed approach may contribute to raising awareness of an impact of the supranationalisation of judicial politics in Europe on national regimes. Although the analysis showed how the evolving intercommunications between these judicial mechanisms influence the process of the European integration, there is still a need to address the issue of increasing the legitimacy and credibility of the European courts operating in a polarised European legal space. Since this might require the improvement of applied methodological approaches, Hanneke Senden has suggested how to enhance the acceptability of these courts' rulings by member states. [82]

Given that the problem of conflicting jurisdictions between national and international courts still continue to attract attention of legal scholars, the most recent contribution to the debate on strengthening the courts' interactions by Georg Nolte and Helmut Philipp Aust played an important role in understanding why international legal obligations are not always interpreted and implemented in national jurisdictions in a uniform way.[83] Those discussions among the academics that intended to answer the question of how domestic courts employ the rules of interpretation of international treaties and to identify the extent to which differences in the interpretation between domestic jurisdictions correlate with the international rules of interpretation present great theoretical and practical value as they provide the basis for the elaboration of convergent approaches to the interpretation of international treaties by domestic

78 Wetzel (n 71); Morano-Foadi (n 71) 30.

79 Dean Spielmann, 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities' in Philip Alston, Mara R Bustelo and James Heenan (eds), *The EU and Human Rights* (OUP 1999) 757.

80 Martinico and Pollicino (n 24).

81 Laurent Scheeck, 'Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks' (GARNET Working Paper No 23/07) 4.

82 Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An analysis of the European Court of Human Rights and the Court of Justice of the European Union* (1 edn, Intersentia 2011).

83 Georg Nolte and Helmut Philipp Aust (eds), *Interpretation of International Law by Domestic Courts-Uniformity, Diversity, Convergence* (OUP 2016).

courts.

Several books have been written on the significance of the Convention mechanism for the protection of human rights in Europe.[84] Alec Stone Sweet and Helen Keller comprehensively examined the impact of the ECHR and of the case law of the ECtHR on the national legal orders. [85] Andrew Drzemczewski in his ground-breaking comparative study on the ECHR threw light on the status of the Convention in the national legal systems of member states, the process of incorporation of the jurisprudence of the Strasbourg Court into divergent legal regimes, the relationship between international and domestic law and determined the extent to which national authorities ensure effective implementation of the Convention in their legal systems.[86] Since little is still known about how to increase the effectiveness of the ECHR in the national legal systems, how to challenge national authorities to adopt decisions and legislation that will be compatible with the Convention this study will attempt to fill that gap.

It has been discussed among scholars that in the majority of member states the ECHR is regarded as an integral part of the national legal system, lacking the same legal status as the Constitution. [87] This has raised a practical question of the status of judgments of the Strasbourg Court in national legal orders of member states, which had a significant resonance in the literature.[88] However, not enough attention has been attached so far to the analysis of contradictions in judicial practices of the ECtHR and the courts of the ECHR member states,[89] particularly in those cases where the enforcement of the ECtHR's judgments might infringe

84 See, eg, Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (6th edn, OUP 2014); Ed Bates, *The Evolution of the European Convention on Human Rights: From it Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010); Mireille Delmas-Marty (ed), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Martinus Nijhoff Publishers 1992).

85 Alec Stone Sweet and Helen Keller (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008).

86 Andrew Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study* (Clarendon Press 1983).

87 Hans-Juergen Papier, 'Execution and Effects of the Judgments of the European Court of Human Rights from the Perspective of German National Courts' (2006) 27 HRLJ 1,1; Anton Burkov, 'How to Improve the Results of a Reluctant Player: The Case of Russia and the European Convention on Human Rights' in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar Publishing 2013) 156.

88 Christian Tomuschat, 'The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court' (2010) 11 German LJ 513, 514; Jens Meyer-Ladewig, 'The German Federal Constitutional Court and the Binding Force of Judgments of the European Court of Human Rights under Art. 46 ECHR' in Hanno Hartig (ed), *Trente ans de droit européen des droits de l'homme*: *études* a la me'moire de *Wolfgang Strasser Droit Et Justice 74 Collection créée par Pierre Lambert et dirigée par Daniel Plas et Michel Puéchavy* (Bruylant 2007) 223; Konstantin Khudoley, 'Konstitutzionnost Reshenii ESPCH y ih Ispolnimost' [The Constitutionality of the Decisions of the ECtHR and Their Enforceability] (2013) 2(20) Q Scientific J Perm U Herald 93.

89 Müller and Gusy (n 30) 27-28; Anton Burkov, *Konvenciya o Zawite Prav Cheloveka v Sudah Rossii* [Convention on Human Rights Protection in Russian Courts] (Wolters Kluwer 2010) 37.

the fundamental principles of national legal systems.

Recent debates have circled around the changing nature of the Strasbourg control mechanism.[90] Some authors, in arguing that the ECtHR could be regarded as 'transnational constitutional court',[91] have extensively scrutinised the process of application of the pilot judgment procedure by the ECtHR,[92] and made recommendations on how to increase its efficiency.[93] Given that it did not prove to be the most suitable instrument for reducing the number of systematic cases at the ECtHR, the academics still have not addressed how to handle this problem to ensure the proper functioning of the Strasbourg Court. Therefore, this study proposes an alternative solution to easing the backlog of the ECtHR, which is focused on strengthening the protection of fundamental rights by domestic judicial mechanisms.

Given that the existing literature does not extensively enough address the whole range of challenges of cooperation between the ECtHR, the CJEU and the courts of the ECHR member states, the author believes that the present study will extend the scope of previously obtained results, and by reflecting in a historical perspective on the development of their interactions, showing how the convergence in their judicial practices may occur, outlining coherent approaches to the interpretation of fundamental rights, and making several recommendations for the improvement of their controversial relationship will assist in building mutually respectful dialogue between the courts and enhancing efficiency of fundamental rights protection in Europe.

90 Luzius Wildhaber, 'A Constitutional Future for the ECtHR?' (2002) 23 HRLJ 161, 163.

91 Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9(3) HRLR 397, 449; Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights' (2013) 12(4) HRLR 655, 686-687.

92 Christian Tomuschat, 'The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions' in Wolfrum and Deutsch (eds) (n 17); Luzius Wildhaber, 'Pilot Judgments in Cases of Structural or Systemic Problems on the National Level' in Wolfrum and Deutsch (eds) (n 17) 75; Philip Leach and others, *Responding to Systemic Human Rights Violations. An Analysis of* '*Pilot judgments*' *of the European Court of Human Rights and Their Impact at National Level* (Intersentia 2010) 176; Costas Paraskeva, 'Human Rights Protection Begins and Ends at Home: The 'Pilot Judgment Procedure' Developed by the European Court of Human Rights' (2007) 3 HRL Commentary 1, 3; Markus Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights' (2011) 12 (5) German LJ 1231, 1231; Janneke Gerards, 'The Pilot Judgment Procedure Before the European Court of Human Rights as an Instrument for Dialogue' in M Claes and P Popelier (eds), *Constittutional Conversations* (Intersentia 2012).

93 Antoine Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges' (2009) 57 Greek LJ 1890, 1902; Lech Garlicki, 'Broniowski and After: On the Dual Nature of 'Pilot Judgments' in Lucius Caflisch and others (eds), *Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg Views* (NP Engel 2007) 177, 183 cited in Solène Guggisberg, 'The European Court of Human Rights: A Constitutional Court Endangering States' Sovereignty?' 11 Cork Online L Rev (2012) 98, 101.

CHAPTER I

COOPERATION BETWEEN NATIONAL AND SUPRANATIONAL COURTS

1.1 Introduction

This chapter will shed light on the relationship between the CJEU and the courts of the member states. Through examination of the case law of the CJEU, it describes the evolution of the system of protection of fundamental rights in the EU, and the impact of this process on the interactions between the Court of Justice and national judiciaries, and the CJEU and the ECtHR.

In approaching these issues, the chapter first explores the cooperation between the CJEU and the FCC in the context of various review mechanisms employed by the state to control the transfer of sovereign powers to the Community and define the limits of European integration. It then goes on to evaluate the extent to which national courts are allowed to conduct a review of EU law, and suggests ways to avoid further conflict situations with the CJEU. Secondly, it describes how the balance of powers between the CJEU and the ECtHR is currently achieved, and discusses possible changes in the nature of this cooperation that the potential accession of the EU to the Convention would entail. The analysis continues with an examination of Opinion 2/13 of the CJEU, which outlined the concerns raised by the Court due to the Accession Agreement being drafted to balance the interests of the contracting parties to the Convention and supranational organisation like the EU, but failing to preserve the autonomy of the EU legal order. It explores those adjustments that would be required to overcome obstacles posed by the CJEU and to proceed with accession negotiations.

The chapter ends by assessing the scope of the application of the equivalent protection doctrine, the prospects of its operation in the event of EU's accession to the Convention, and the challenges it might cause for the future relationship between the ECtHR and the CJEU.

1.2 Review limits: interactions between the CJEU and the courts of the member states

The problem of determining the limits of European integration and the constitutionality of EU legislation has proved to be fundamental, particularly in the early years of functioning of the examined judicial institutions. Although the principles of supremacy and direct effect of EU law guaranteed its effective enforcement, the emergence of contradictions between national and EU law was inevitable as the domestic courts, when adjudicating cases involving EU law, were governed by the idea of safeguarding constitutional orders of states. It is thus important to analyse how the relationship between the EU and the national legal systems developed, to scrutinise the reasons for the continuous resistance of states to accepting EU law unconditionally, and to propose solutions for mitigating jurisdictional conflicts between the CJEU and national courts.

1.2.1 Fundamental rights review

The main concern that emerged following World War II was the need to restore economically ravaged European countries. Both the Treaty of Paris of 1952 and the Treaty of Rome of 1957[94] focused on economic growth through cooperation, and left issues relating to human rights largely to member states and their constitutions,[95] despite having included several references to human rights.[96]

The adoption of the German Constitution (Basic Law) on 23 May 1949, which acknowledged the 'inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world',[97] affectted the functioning of the ECJ that had not considered itself responsible for the protection of fundamental rights.[98] The ECJ first adjudicated on human rights issues in *Stauder v City of Ulm,*[99] in which it confirmed its duty to secure human rights as being an integral part of the general principles of Community law.[100] In this leading case concerning the problems of interpretation of EC law, the applicant, having alleged a violation

94 Treaty establishing the European Economic Community (opened for signature 25 March 1957, entered into force 1 January 1958) 298 UNTS 11 (Treaty of Rome).
95 Bates (n 84) 161.
96 Treaty of Rome (n 94), arts 7, 19.
97 Grundgesetz für die Bundesrepublik Deutschland (Basic Law) BGBl I, 1, art 1(2).
98 Case 1/58 *Stork v High Authority* [1959] ECR 17, para 26.
99 Case 29/69 *Stauder v City of Ulm* [1969] ECR 419, 425.
100 ibid [7].

of Articles 1 and 3 of the Basic Law, challenged the Commission decision of 12 February 1969[101] that envisaged a special scheme authorising member states to distribute surplus butter at a reduced price to certain categories of recipients on condition that their names were revealed on vouchers. The Administrative Court of Stuttgart referred the case to the ECJ for a preliminary ruling pursuant to Article 267 TFEU[102] to revise the compatibility of the contested rule with the general principles of Community law.

Having permitted each member state to determine its own ways of referring to the individuals, the ECJ indicated that it was the wording of the German text that required to include such details on the coupon.[103] It was emphasised that a uniform interpretation of the real intention of the legislature should be ensured, and no stricter obligations should be imposed in some member states than in others.[104] In case of potential conflicts, the most liberal interpretation of EC law should be adopted as this would not infringe fundamental rights enshrined in the general principles of Community law.[105] In its reasoning the ECJ confirmed that the rule under consideration had to be interpreted as not requiring the indication of the beneficiaries' names on coupons.[106]

Despite the fact that the principles of supremacy[107] and direct effect of EC law[108] had already been developed by the ECJ in its jurisprudence, tensions between Community law and national law seemed to be inevitable. The main challenge in this respect was to determine whether, and, if so, to what extent, Community law could override fundamental rights guaranteed by the German Constitution,[109] which in Article 24 allowed for the transfer of sovereign powers by law to international organisations. In search of an answer to this question, it would be useful to examine judicial practice of the FCC, which has paid particular attention to ensuring strong protection of fundamental rights in Germany since the date of its establishment in 1951.[110] Some light is thrown on this by the case *Internationale*

101 Commission Decision (EEC) 69/71 of 12 February 1969 [1969] OJ L52.
102 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ L326/47-326/390 (TFEU).
103 *Stauder* (n 99), para 2.
104 ibid [3]-[4].
105 ibid [4].
106 ibid [6].
107 Case 26/62 *Van Gend en Loos v Nedelandse Administratie der Belastingen* [1963] ECR 1.
108 Case 6/64 *Costa v ENEL* [1964] ECR 585.
109 Torsten Stein, 'La Jurisprudencia de los Tribunales Alemanes en Relación con el Derecho Communitario Europeo' [The Jurisprudence of the German Courts in relation to the European Community Law] (1982) 9(3) Revista de Instituciones Europeas 785, 794.
110 Ola Zetterquist, 'The EU Constitution Viewed in the Light of Fundamental Constitutional Theories' in Joakim Nergelius (ed), *Nordic And Other European Constitutional Traditions* (Martinus Nijhoff Publishers

Handelsgesellschaft, [111] in which the applicant claimed that under Council Regulation of 13 June 1967 on the common organisation of the market in cereals[112] and the Commission Regulation of 21 August 1967 on import and export licences,[113] a system of import and export licences guaranteed by a deposit was in conflict with the right to freely choose the occupation or profession enshrined in Article 12(1) of the Basic Law.[114]

On reference by the Administrative Court of Frankfurt-am-Main to the ECJ for the preliminary ruling,[115] the legal validity of these regulations under EEC law was confirmed in a judgment of 17 December 1970.[116] The ECJ's finding was grounded on the autonomous status of Community law, which should not be overridden by national rules, and the validity of which could not be affected even if it could endanger the principles of national constitutional structure.[117] Having emphasised that the applications for licences were made freely and in knowledge of the agreed consequences, the ECJ declared that the forfeiture of the deposit only served to enforce accepted obligations.[118]

As a consequence of the ECJ ruling, the Administrative Court requested the FCC under Article 100(1) of the Basic Law, which would empower it to declare an Act of Parliament to be void for violation of the German Constitution, to examine whether imposed under Community law obligations were compatible with the Basic Law. Delivering its decision on 29 May 1974, the FCC stated that, although Article 24 of the German Constitution envisaged the delegation of sovereign powers to interstate institutions, this could not create conditions for amending that part of the Basic Law concerning the fundamental rights without formal modifications to it, as it constitutes the basis of the constitutional structure of the Basic Law.[119] This position of the FCC was based on the fact that the integration process in the Community did not advance to the extent that it could guarantee the existence of a democratically legitimate parliament and a codified catalogue of fundamental rights, which

2006) 25.

111 *Solange I* (n 31), provisional English translation of the judgment is provided by the University of Texas at Austin at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588> accessed 21 October 2015; references in this study refer to paragraphs of this translation.

112 Council Regulation (EEC) 120/67 of 13 June 1967 on the common organisation of the market in cereals [1967] OJ English Special Edition 33.

113 Commission Regulation (EEC) 473/67 of 21 August 1967 on import and export licences [1967] OJ 204/16.

114 Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, paras 1, 6.

115 VGH Frankfurt-am-Main *Internationale Handelsgesellschaft* (No II/ 2E 228/ 69) [1970] 9 CMLR 294.

116 Case 11/ 70 (n 114), paras 20, 25.

117 ibid [3].

118 ibid [18].

119 *Solange I* (n 111), s AI-4: 3-4.

would be comparable to the 'substance of the Basic Law'.[120] The FCC has therefore created a presumption that the guarantees of fundamental rights under the Basic Law will be given priority as long as the Community organs have not resolved the conflict of norms.[121] It was clarified that, because the ECJ was not empowered to decide the questions of national law of member states, the FCC was similarly not authorised to rule on the validity of Community law.[122]

Since the implementation of the Community regulation entailed the exercise of German state power, the national authoritites and domestic courts were bound in this process by the constitutional law of Germany.[123] This might explain why, any act proceeding from Community law that contradicted the Basic Law was subject under Article 90(2) of the Law 'On the FCC'[124] and Article 100(1) of the Basic Law to fundamental rights review by the FCC with a view to determining its applicability in Germany. Given that it was still not possible either to resolve this clash of norms or to guarantee at the Community level efficient protection of fundamental rights comparable to that under the Basic Law, any similar references to the FCC were acknowledged as 'admissible and necessary'.[125] It was held in the present case that the system of deposits envisaged by the challenged rules was appropriate at that stage of the Community's economic development and aimed to avert potential negative effects for the EEC.[126] Since there was no evidence that the right of the complainant under Article 12 of the Basic Law could be violated, no obstacles existed to the implementation of the disputed regulation by German authorities.

Having criticised the decision of the FCC in *Solange I* as undermining the principle of primacy of Community law and thus posing a threat to its uniform application, in its Report of 1974 the Commission emphasised that the exclusive jurisdiction of the ECJ to interpret Community law was not being respected.[127] From then on, the ECJ continued to promote its commitment to guaranteeing effective protection of fundamental rights at the Community in order to safeguard the autonomy of its legal order.

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120 ibid [4].
121 ibid.
122 ibid, s AI -5 a, b.
123 ibid, s 7c.
124 BVerfGG [FCC Act] 11 August 1993, BGBl I, 1473, as last amended by the Act of 16 July 1998 BGBl I, 1823.
125 *Solange I* (n 111), s A4 ss 7c.
126 ibid, s B III: 1-2.
127 Commission (EC), 'Eighth General Report on the Activities of the European Communities 1974' (Working Document) February 1975, 270.

The significant place of fundamental rights in the Community law has been confirmed by the ECJ in its case law. In *Nold v Commission*,[128] a German coal wholesaler challenged the legality of the Decision of the Commission of 21 December 1972 authorising new terms of business of Ruhrkohle AG[129] on the grounds that modified conditions for acquiring direct wholesaler status constituted a violation of fundamental rights, including property ownership, free development of the personality, freedom of economic action that were secured by Article 14 of the Basic Law and by the Constitution of Hesse,[130] and were recognised 'by the Constitutions of other member states of the Community, by international Conventions and by the ECSC Treaty itself'.[131] Even though the Commission was conscious that a great number of dealers would not be able to meet the newly introduced criteria,[132] the application of this measure was justified by the necessity of concluding long-term contracts with dealers to stabilise the marketing system due to the decrease in coal sales.[133] The ECJ stressed that in case it was dictated by the needs of the public interest, these rights were permitted to be limited in the Community legal order 'if the substance of these rights is left untouched'.[134]

The importance of *Nold* lies in the fact that the ECJ broadened the interpretation of the principle of fundamental rights,[135] as in identifying the Community standards for human rights protection it also made a reference to international treaties to which member states were parties.[136] This could confirm that the ECJ had recognised that the fundamental rights from different sources were regarded as constituting part of Community law and were to be respected as accentuated by the Joint Declaration adopted on 5 April 1977 by the European Parliament, the Council and the Commission in the exercise of their powers.[137] Further commitment of the Community to the strengthening of the fundamental rights protection was

128 Case 4/73 *Nold v Commission* [1974] ECR 491.
129 Commission Decision (EEC) of 21 December 1972 authorising new terms of business of Ruhrkohle AG [1973] OJ L120/14.
130 Verfassung des Landes Hessen [Constitution of the Land of Hesse] 1 December 1946, GVBl 1946, 229.
131 *Nold* (n 128), paras 12-13.
132 ibid, 'facts': 'to sell during the preceding coal industry year at least 75000 metric tons of fuels originating from Community coalfields, of which at least 40000 metric tones were to have been sold in the sales area where he wished to acquire the rights to operate as a dealer, of which at least 12500 metric tones were to have been bought from the selling agency concerned'.
133 ibid [9].
134 ibid [14].
135 Takis Tridimas, 'Primacy, Fundamental Rights and the Search for Legitimacy' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 99.
136 *Nold* (n 128), paras 12-13.
137 Joint Declaration by the European Parliament, Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Funddamental Rights and Freedoms/ [1977] OJ C103/1.

also reflected in the approval by the European Council of the Declaration on Democracy in 1978.[138]

Having emphasised that the international treaties for the protection of human rights 'could supply guidelines which should be followed within the framework of the Community',[139] the ECJ explicitely relied on this in *Liselotte Hauer v Land Rheinland-Pfalz* which concerned limitations on planting vines.[140] It was held that Article 2 of the Council Regulation of 17 May 1976,[141] which banned new planting of vines for a period of three years, did not infringe the landowner's rights to pursue a trade and a right to property guaranteed by Articles 12 and 14 of the Basic Law, Constitutions of the member states, and Article 1 of the Protocol No 1 to the Convention[142] as it intended to prevent the overproduction of wine in the Community. [143]

Given that probable violations of fundamental rights by Community institutions could only be examined from the perspective of Community law, imposed in respect of the applicant restrictions were justified by the objectives pursued by the Community.[144] Even though the owner still had a control over his property and remained free to exercise it for non-prohibited purposes, he was constrained in using it. The ECJ, despite referring to Article 1(2) of Protocol No 1 that pertmitted 'to enforce such laws as it deems necessary to control the use of property in accordance with the general interest', stressed that it did not provide any further clarification on the application of such limitations.[145] Thus, the ECHR with its Protocols was considered by the ECJ as instruments ensuring minimum standards for the protection of fundamental rights at the Community level.

In *Wünsche Handelsgesellschaft*, the Federal Office of Food and Forestry, relying on the Commission Regulation of 8 August 1974 stipulating protective measures applicable to imports of preserved mushrooms,[146] refused in July 1976 to issue a license for 1,000 tons of

138 European Council (EC) Declaration on Democracy [1978] 3 EC Bull 6, Annex D.
139 *Nold* (n 128), para 13.
140 Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para 15.
141 Council Regulation (EEC) 1162/76 of 17 May 1976 on measures designed to adjust wine-growing potential to market requirements [1976] OJ L135/32.
142 Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 20 March 1952, entered into force 18 May 1954) CETS No 009.
143 *Hauer* (n 140), paras 8, 17-20.
144 ibid [30].
145 ibid [19].
146 Commission Regulation (EC) 2107/74 of 8 August 1974 stipulating protective measures applicable to imports of preserved mushrooms [1974] OJ L218/54.

Taiwanese canned mushrooms to the German importer.[147] Despite the fact that the applicant was arguing that the market conditions had been changed and the Regulation was thus ineffective, the Administrative Court's judgment of 1978 rejected claims of abuse of power by the Commission on the grounds that it was still necessary to secure the objectives of the common agricultural policy laid down in Article 39 of the Treaty of Rome.[148]

Suspending proceedings, the Federal Supreme Administrative Court referred the question of validity of the Regulation to the ECJ for a preliminary ruling, which did not consider it appropriate to abolish the protective measures owing to the ongoing market conditions.[149] Further objections to the ECJ's decision were dismissed by the Federal Supreme Administrative Court in its judgment of 1 December 1982,[150] and refused leave either to present a case to the FCC pursuant to Article 100(1) of the Basic Law, or to refer the case for a new ruling to the ECJ.[151]

The ECJ held in *CILFIT* that the courts were exempted from their obligation to submit the case for a further preliminary ruling if:

> '[a] the question raised is irrelevant or [b] that the Community provision in question has already been interpreted by the Court or [c] that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt'. [152]

Reference to this new ruling in the same case would be accepted by the ECJ in the event either of inaccuracy of the previous interpretation, or when a new legal issue has been challenged, or due to performance of the new facts that would lead to reaching a distinct conclusion. The applicant's appeal was rejected as it did not meet these criteria,[153] and the exercise of this right to challenge the validity of a previously delivered judgment[154] was not allowed because it was not listed among the acts of Community institutions that could be

147 *Solange II* (n 32), s AI 1 (b); provisional English translation of the judgment is provided by the University of Texas at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=572> accessed 21 October 2015. The references in this work refer to paras of this translation.
148 ibid.
149 Case 126/81 *Wünsche Handelsgesellschaft v Federal Republic of Germany* [1982] ECR 1479, para 17.
150 Federal Supreme Administrative Court Judgment of 1 December 1982 (7 C 87.78) cited in *Solange II* (n 67).
151 *Solange II* (n 147), s AI 2 d-e.
152 Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, para 21.
153 Case 69/85 *Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany* [1986] ECR 947, para 15.
154 Case 345/82 *Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany* [1984] ECR 1995.

subject to review under Article 267 TFEU.[155]

The petitioner's claim under Article 100(1) of the Basic Law could also not be satisfied as the FCC was not authorised to conduct a constitutional review of the compatability of the preliminary ruling of the ECJ with the provisions of the Basic Law.[156] Being deprived of the constitutional right to a hearing guaranteed under Article 101(1) of the Basic Law, the appellant argued that the Federal Supreme Administrative Court disregarded its procedural and substantial rights secured by the German Constitution.[157] Therefore it was important to define whether the ECJ was considered lawful within the meaning of Article 101(1) sentence 2 of the Basic Law.

In its Twentieth General Report on the Activities of the EC, the Commission confirmed that, by 1986, 'real progress' in the Community's contribution to the strengthening human rights guarantees has been achieved.[158] Having affirmed positive developments in ensuring fundamental rights protection in the EC that was regarded 'substantially similar' to that provided under the Basic Law,[159] the FCC was confident in the legitimacy of the ECJ,[160] and eventually abandoned the exercise of its jurisdiction to rule on the compatibility of the secondary Community legislation with the provisions of the Basic Law.[161] Given that the FCC's previous position has been replaced and the ECJ was given a 'place in the German constitutional structure as lawful court',[162] the Federal Supreme Administrative Court was no longer obliged to transfer the case to the FCC. Any such petitions to the FCC under Article 100(1) were thereafter inadmissible as long as it was not shown that the level of protection provided in the Community has decreased since *Solange II*.

There is clearly strong willingness among the Community institutions to ensure the

155 Case 69/85 (n 153), para 16.
156 *Solange II* (n 147), s BI d.
157 ibid, s AII.
158 Commission (EU), Twentieth General Report on the Activities of the European Communities (1986) OOPEC 370.
159 *Solange II* (n 147), s BI aa; Torsten Stein, 'Der Beschluß des Bundesverfassungsgerichts vom 22. Oktober 1986 zur Verfassungsrechtlichen Überprüfung des Abgeleiteten Europäischen Gemeinschaftsrechts am Maßstab des Grundgesetzes (*Solange II* - Beschluss) [The Decision of the FCC of 22 October 1986 on the Constitutional Review of the European Community Law on the basis of the Basic Law (Solange II-Decision)] (1987) 47 ZaöRV 279, 282.
160 E R Lanier, '*Solange,* Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge' (1988) 11 (1) Boston College Intl & Comp L Rev 1, 1.
161 *Solange II* (n 147), s BII F.
162 Monica Claes, *The National Courts' Mandate in the European Constitution,* Modern Studies in European Law (Hart Publishing 2006) 427.

observance of fundamental rights and to integrate them into Community law. However, as not all the rights secured by the Basic Law have so far been examined by the ECJ, it could be that legal gaps might occur as it uses a case-by-case approach and the protection of fundamental rights is still in a transitory phase. [163] This is why it was crucial to exclude a parallel reading of fundamental rights contained in Community law and national legislation in order to secure comprehensive protection of human rights at the Community level.

1.2.2 *Ultra vires* review

The FCC largely maintained its non-intervening approach in reviewing EU secondary legislation, but proclaimed in *Maastricht* its authority to exercise control over the powers of the EC.[164] Such reservation, according to Andreas Voβkuhle, was necessary for ensuring that the EU and its legal system are functioning properly, and that the national identities of the member states as stipulated in Article 4(2) TEU[165] are respected.[166]

Although the FCC acknowledged the constitutionality of German ratification [167] of the Maastricht Treaty,[168] which was followed by several amendments to the Constitution,[169] the Court pointed out that the transfer of powers to the EC under Article 24(1) of the Basic Law was subject to restrictions envisaged by Article 79(3).[170] By restating that Germany remained a member of a 'compound of states',[171] which exercised its powers under the authorisation of those states, the FCC has confirmed that the German Federal Parliament 'must retain functions and powers of substantial import' to secure the constitutional principles and fundamental interests of the state.[172]

163 *Solange II* (n 147), s II 1 e, d.
164 *Maastricht* (n 33), s CI 3; references in this work refer to paragraphs of the translation by Wegen 33 ILM 388 (March, 1994).
165 Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 (TEU).
166 Voβkuhle (n 10) 193.
167 Gesetz zum Vertrag vom 7. Februar 1992 über die Europäische Union [German Act Approving the Maastricht Treaty] 31 December 1992, BGBl II, 1251.
168 Treaty on European Union [1992] OJ C 191/1 (Maastricht Treaty).
169 Gesetz zur Änderung des Grundgesetzes [Act Amending the Basic Law] 21 December 1992 (which added art 23, art 28 para 1 sentence 3, art 52 para 3a, and art 88 sentence 2 to the Basic Law) BGBl I, 2086.
For the discussion on those amendments, see Kevin D Makovski, 'Solange III: The German Federal Constitutional Court's Decision on Accession to the Maastricht Treaty on European Union' (1995) 16(1) U Pennsylvania J Intl Business L 155, 159-160; Rupert Scholz, 'Grundgesetz und Europaeische Einigung' [Basic Law and European Unity] (1992) 45 NJW 2593, 2594.
170 *Maastricht* (n 164), s B 3a.
171 ibid, s II 1a subpara 3.
172 ibid, s CI 2 b, c.

As a final arbiter in deciding issues of national constitutional law,[173] one would not doubt that the FCC was a principal actor in determining the scope of transferred to the EU powers. For that reason, the FCC reserved the right to declare any legal act of the Community adopted without the approval of the Federal Parliament *ultra vires* and not binding in Germany.[174] Since democratic regime was still lacking in the Community, the FCC exercised its power to identify whether or not the actions of EU institutions fell within the limits of the competences conferred on them.[175] Although this approach was not regarded as friendly,[176] the FCC, being a 'subsidiary guardian of the European Legal Order',[177] maintained an overview of all acts of the EU institutions, including those of the ECJ, in a 'co-operative relationship'.[178] This would mean that to preserve the unity of the EU legal system, the Court would not adjudicate on issues stemming from EU law prior to consideration of the case under Article 267 TFEU by the Court of Justice. This might be considered as respectful treatment of the position of the ECJ, which was also demonstrated by the FCC in *Honeywell*, in which, having triggered an *ultra vires* review, the Court examined the applicability in Germany of the ECJ's decision in *Mangold v Helm*,[179] which dealt with question of the employment of senior workers. The ECJ was asked to scrutinise provisions of German law on part-time work and fixed-term contracts[180] which domesticated the Council Directive of 28 June 1999,[181] and compatibility with Article 6 of the Council Directive of 27 November 2000,[182] which had not been transmitted into German law.[183] This lack of incorporation did not have decisive impact on the outcome of the case, but the ECJ reaffirmed that the state should avoid enacting any conflicting measures during the period prescribed for transposition of a Directive.[184] Therefore it was concluded that the national authorities were responsible for annulling any provisions of the national regulations that contradicted EU law.[185]

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173 Kumm (n 60) 369.
174 ibid 363; *Maastricht* (n 164), s C1 3 sub-s 3.
175 ibid, s CII 2a sub-s 2.
176 Torsten Stein, 'La Sentencia Del Tribunal Constitucional Aleman Sobre el Tratado De Maastricht' [The Judgment of the German Constitutional Court on the Treaty of Maastricht] (1994) 21(3) Revista de Instituciones Europeas 745, 768.
177 Kumm (n 60) 380.
178 *Maastricht* (n 164), s B 2b sub-s 2.
179 Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.
180 Gesetz über Teilzeitarbeit und Befristete Arbeitsverträge [Law on Part-Time Work and Fixed-Term Contracts] 21 December 2000, BGBl I, 1966, s 14 sub-s 3.
181 Council Directive (EC) 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L175/43.
182 Council Directive (EC) 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Directive 2000/78/EC).
183 Case C-43/05 *Commission of the European Communities v Federal Republic of Germany* [2006] ECR I-33.
184 *Mangold* (n 179), para 67.
185 ibid [77]-[78].

As soon as the ruling of the ECJ was obtained, the FCC, in exercising its role as 'guardian of the constitutional order'[186] examined in *Honeywell*[187] whether *Mangold* was *ultra vires*, and so inapplicable in Germany. The Court elaborated a strict approach[188] to the exercise of its power in *ultra vires* review by reducing its application to:

> ''sufficiently qualified' violation of competences, which […] leads to a structurally significant shift in the structure of competences between Member States and a supranational organisation'.[189]

Since this represented a high bar, the probability of the FCC declaring the EU normative act *ultra vires* was almost nil,[190] as it would be difficult to generate any clear criteria to qualify for this standard of review.[191] Given that in *Mangold* neither a breach of the principle of conferral nor a significant shift in the allocation of powers was observed,[192] the claim that the ECJ acted *ultra vires* was dismissed.[193] The FCC, having thus undergone considerable changes in its approach to *ultra vires* review, paved the way to harmonisation of the relationship between the German and the European legal orders.

Along with the oversight role of the FCC, the CJEU was also authorised to monitor compliance by the member states with their obligations under EU law to ensure the coherence of the Community legal system. In *Tanja Kreil v Bundesrepublik Deutschland*[194] concerning military service by women in Germany, the ECJ ruled that any provisions of national legislation exempting women from posts involving the use of arms were in breach of the Council Directive of 9 February 1976 on equal treatment, including in the workplace.[195] Although issues of security and the organisation of armed forces were matters for the member

186 Donald P Kommers and Russell A Miller (eds), *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke UP 2012) 3.

187 BVerfGE 126, 286 [2011] 1 CMLR 1067 (Honeywell), provisional English translation of the judgment is provided by the Court at <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html> accessed 21 October 2015. References in this work refer to paragraphs of this translation.

188 Payandeh (n 62) 10.

189 *Honeywell* (n 187), para 102 b.

190 Stein (n 69) 227.

191 Daniel Gehlhaar, 'Honeywell in der Praxis – Ein Aus- und Über blick' [Honeywell in Practice — Prospective and Overview] (2010) NZA1053,1054.

192 *Honeywell* (n 187), para 71b.

193 ibid [93].

194 Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69.

195 Council Directive (EEC) 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40.

states,[196] this did not prevent the Community from retaining a certain degree of control.[197] The ECJ stressed that any derogation from the principle of equal treatment must accord with the principle of proportionality and be justified by reasons of public security.[198] The intention of the German government to provide a degree of protection to women did not have to exclude them from an access to various types of employment.[199] Thereafter, the German government reviewed its position[200] and amended[201] the provisions of the Basic Law to bring its national legislation in line with EU law.

To secure effective enforcement of EU law, in *Andrea Francovich and Danila Bonifaci and others v Italian Republic* the ECJ has recognised the option to hold member states responsible for breaches of EU law by obliging them to pay compensation to individuals for infringement of their obligations stemming from the Treaties.[202] In striving to strengthen legal certainty within the EU, in *Köbler* the ECJ extended states' liability for violations of EU law,[203] particularly those originating from Article 267(3) TFEU, under which domestic courts are obliged to bring the case before the Court for a preliminary ruling. However, even if the ECJ was empowered to sanction member states for non-compliance with or incorrect application of EU law, it would not be able to hold it responsible directly, as the cases of liability would be decided in national legal proceedings.

Thus, even having transferred certain sovereign powers to a supranational organisation, Germany reserved the right to determine the limits of its relationship with the Community by reviewing the compatibility of acts of the European institutions with the requirements of the German Constitution. To minimise potential conflict situations between the courts it would seem prudent that their subsequent relationship has been based on mutual trust which to ensure that EU law is uniformly and consistently applied by national authorities, and to prevent any actions of EU institutions going beyond those powers assigned to them by national governments.

196 Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR I-7403, paras 15, 27, 28.
197 *Kreil* (n 194), para 15.
198 ibid [23].
199 ibid [30].
200 Ulrike Liebert, 'Europeanizing the Military: The ECJ and the Transformation of the Bundeswehr' in Heidi Gottfried and Laura A Reese (eds), *Equity in The Workplace: Gendering Workplace Policy Analysis* (Lexington 2004) 332.
201 Gesetz zur Änderung des Grundgesetzes (Artikel 12a) [Law Amending the Basic Law (Article 12a)] 19 December 2000, BGBl I, 1755; Gesetz zur Änderung des Soldatengesetzes und Anderer Vorschriften [Law Amending the Soldiers Act and Other Provisions] 19 December 2000, BGBl I, 1815.
202 Joined cases C-6/90 and C-9/90 [1991] ECR I-5357, para 35.
203 Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239, paras 52-53.

1.2.3 Constitutional identity review

Having confirmed in *Maastricht* that *ultra vires* review exclusively fell within its jurisdiction, the FCC reaffrimed this approach in *Lisbon*[204] in which it acknowledged the constitutionality of the German act[205] approving the Lisbon Treaty.[206] To guarantee the 'inviolable core content of the Basic Law's constitutional identity' pursuant to Articles 23(1) and 79(3) of the Basic Law, the FCC has introduced a new form of review, namely constitutional identity review, which does not conflict with the principle of 'sincere cooperation' stipulated by Article 3a(3) of the Lisbon Treaty, and was to be exercised in accordance with the Basic Law's openness to European Law, and the principle of subsidiarity under Article 3b(3) of the Lisbon Treaty.[207] The FCC has thus maintained its power to declare EU law inapplicable in the national legal system if the European institutions overstepped their competences or the acts infringed the German Constitution.[208]

In carrying out the 'responsibility for integration', the FCC with a view to protecting the fundamentals of state's constitutional system has recognised the necessity to leave to the member states a 'sufficient space […] for the political formation of the economic, cultural and social living conditions'[209] and therefore limited the delegation of sovereign powers to the EU, particularly in criminal law, the use of force by the police and the military, fiscal decisions on public revenue and expenditure, the social state, and on issues of cultural importance, for example in family law, the education system and on dealing with religious communities.[210] Since it is not possible to determine precisely all the areas that may be significant for a constitutional state, the CJEU would require the assistance of the national courts[211] to specify what should be considered as a part of the constitutional identity of the member states to prevent any disproportionate intrusion into their national legal order by EU institutions,[212] and to reduce jurisdictional conflicts between the courts, which tend to occur in

204 *Lisbon* (n 34), para 240.
205 Gesetz vom 8 Oktober 2008 zum Vertrag von Lissabon vom 13 Dezember 2007 [Law of 8 October 2008 on the Treaty of Lisbon of 13 December 2007] BGBl II, 1038.
206 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/ 01 (Lisbon Treaty).
207 *Lisbon* (n 34), paras 225, 240.
208 ibid [241].
209 ibid [245], [249].
210 ibid [252]-[260].
211 De Visser (n 47) 416.
212 Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 CMLR 1417, 1441.

their practices as will be demonstrated below in *Data Retention.*[213]

From the adoption of the first Federal Data Protection Act in 1977,[214] Germany followed a policy of providing strong security guarantees against any encroachment by the state on fundamental right to respect for private life.[215] Given that the exercise of freedom that 'may not be totally be recorded and registered' was recognised as a part of the constitutional identity of Germany,[216] the legislation[217] transposing the Directive 2006/24 concerning data retention[218] into the Telecommunication Surveillance Act[219] and the Criminal Procedure Code[220] was held to be void by the FCC due to its incompatibility with Article 10(1) of the Basic Law ensuring the confidentality of communications.[221]

As the FCC did not itself turn to the CJEU for a preliminary ruling under Article 267 TFEU on the validity of the Directive, requests were made by the High Court of Ireland and the Constitutional Court of Austria to clarify whether the challenged Directive allowing the storing of personal data was compatible with the rights to privacy and data protection laid down in the EUCFR.[222] On 8 April 2014, the Court of Justice held that the Directive was invalid because the EU legislature by adopting it 'has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter'.[223] The Directive on Data Retenion was struck down, and the national measures implementing it were quashed, which eventually strengthened the privacy protection.[224] This

213 BVerfGE 125, 260, 1 BvR 256/08 (2 March 2010) NJW 2010, 833 (*Data Retention*).
214 Gesetz zum Schutz vor Mißbrauch Personenbezogener Daten bei der Datenverarbeitung of 27 January 1977 [Law on Protection Against Misuse of Personal Data in Data Processing] BGBl I, 201.
215 James Beckman, *Comparative Legal Approaches to Homeland Security and Anti-terrorism* (Ashgate Publishing 2007) 102-105.
216 *Data Retention* (n 213), para 218.
217 Gesetz zur Neuregelung der Telekommunikationsüberwachung und Anderer Verdeckter Ermittlungsmaßnahmen sowie zur Umsetzung der Richtlinie [Law on Amending the Telecommunications Surveillance and Other Secrete Investigation Measures and the Implementation of Directive 2006/24/EC] 21 December 2007, BBGl I, 3198.
218 Directive (European Parliament and the Council) 2006/24 of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and Amending Directive 2002/58 [2006] OJ L 105/54 (Directive on Data Retention).
219 Telekommunikationsüberwachungsgesetz [Telecommunication Surveillance Act] 25 July 1996, BGB1 I, 1120.
220 StPO [Criminal Procedure Code] 7 April 1987, BGBl I, 410.
221 *Data Retention* (n 213), para 306.
222 *Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014] OJ C175/6, paras 18, 20.
223 ibid [69], [71].
224 Federico Fabbrini, 'Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States' (2015) 28 Harvard Human Rights J 65, 94.

illustrates that, when it comes to maintaining congruence between EU law and national constitutional law, the CJEU is willing to respond to concerns raised by the member states. Such an approach reaffirmed the obligation of EU institutions to show respect for the national identities of states, as stipulated in Article 4(2) TEU.

Despite these positive trends, however, certain conflicting situations between the courts still emerge as can be seen in *Melloni* which concerned the execution of a European Arrest Warrant when the person was convicted *in absentia*. By its Order of 15 December 2015, the FCC declined to authorise any acts in such circumstances, because a trial in Germany in the absence of accused would be in violation of Article 1(1), 23(1) and 79(3) of the Basic Law, even though the Council Framework Decision on the European Arrest Warrant[225] had been transposed into German law.[226]

Having triggered its 'identity control' over the implementation of issued by Italian authorities European Arrest Warrant, that in essence amounted to an indirect review of the Framework Decision,[227] the FCC overturned the decision of the Higher Regional Court in Düsseldorf that accepted the extradition of a convicted felon from Germany who had been tried and sentenced *in absentia.*[228] The FCC held that the surrender of a convicted person to another member state of the EU, where no guarantees for a new hearing of a case with presentation of the evidence were provided, would deprive the applicant of a right to an effective legal remedy, and remitted the case for consideration.[229] Christian Tomuschat has argued that the extradition endangering the constitutional principles and posing a threat to fundamental rights of the individual would contravene not only the German legislation, but the main principles of the functioning of the EU enshrined in Article 6 TEU.[230]

Given the position of the FCC, which was at odds with a ruling of the CJEU[231] in a previous

225 Council Framework Decision 2002/584/JHA of 13 June 2002 on the european arrest warrant and the surrender procedures between member states [2002] OJ L190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 [2009] OJ L81/24.

226 Gesetz über die Internationale Rechtshilfe in Strafsachen [Act on International Cooperation in Criminal Matters] 15 September 2000, LGBl 2000 Nr 215.

227 Daniel Sarmiento, 'The German Constitutional Court and the European Arrest Warrant: The latest Twist in the Judicial Dialogue' (Blog 'Despite our Differences', 27 January 2016) <http://eulawanalysis.blogspot.de/2016/01/the-german-constitutional-court-and.html> accessed 17 August 2016.

228 OLG Düsseldorf 27 November 2014 - III - 3 Ausl 108/14.

229 *Melloni* (n 35), paras 109, 124

230 Christian Tomuschat, 'Inconsistencies – The German Federal Constitutional Court on the European Arrest Warrant' (2006) 2(2) Eu Const L Rev 209, 215.

231 Case C-399/11 *Stefano Melloni v Ministerio Fiscal* (Grand Chamber) [2013] OJ C114/12.

analogous case brought by Spain,[232] Mathias Hong has opined that the FCC will ensure the protection of the right to human dignity 'not only *against* conflicting Union law if necessary, but also *parallel* to its European protections'.[233] Remarkably, unlike the Spanish authorities which reduced the level of protection of the contested right [234] to secure effective implementation of EU law, but not contrary to the constitutional gurantees, [235] the FCC's message to the CJEU was that 'it is not willing to buy the *Melloni* case-law' against its traditions of the protection of fundamental rights under the Basic law.[236] Asteris Pliakos and Georgios Anagnostaras have argued that to mitigate conflict with the national judiciaries, the CJEU should reconsider its approach in *Melloni* to give more space to member states to apply their national guarantees for the protection of fundamental rights, particularly in cases where issues of constitutional identity are at stake.[237]

Despite criticism of the FCC decisions in *Lisbon*[238] and *Melloni*,[239] it was not the only constitutional body that upheld 'the flag of national autonomy'[240] by guarding those exclusive powers at domestic level. The same approach has also been taken in the Constitutional Court of the Czech Republic,[241] the Italian Constitutional Court,[242] and the Polish Constitutional

232 TC, Order of 9 June 2011, ATC 86/2011.

233 Mathias Hong, 'Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court' (Verfassungsblog On Matters Constitutional, 18 February 2016 <http://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court/ >accessed 19 September 2016.

234 TC, Decision of 13 February 2014, STC 26/2014 BOE N 60, 11 March 2014.

235 Leonard F.M. Besselink, 'The ECJ as the European ''Supreme Court'': Setting Aside Citizens' Rights for EU Law Supremacy' (Verfassungsblog on Matters Constitutional, 18 August 2014) <http://verfassungsblog.de/ecj-european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy/> accessed 19 August 2016.

236 Sarmiento (n 227).

237 Pliakos and Anagnostaras (n 61) 125.

238 Andreas Fischer-Lescano, Christian Joerges and Arndt Wonka (eds), The German Constitutional Court's Lisbon Ruling: Legal and Political-Science Perspectives (Centre of European Law and Politics, ZERP Discussion Paper 1/2010; for further discussion see therein, eg, Arndt Wonka, 'Accountability Without Politics? The Contribution of Parliaments to Democratic Control of EU Politics in the German Constitutional Court's Lisbon Ruling' 55-62; Andreas Fischer-Lescano, 'Judicial Sovereignty Unlimited? A Critique of the German Federal Constitutional Court's Ruling on the Lisbon Treaty' 63-70; Ulrike Liebert, 'More Democracy in the European Union?! Mixed Messages from the German Lisbon Ruling' 71-83.

239 Maximilian Steinbeis, 'Europarechtsbruch als Verfassungspflicht: Karlsruhe zuendet die Identitaetskontrollbombe' [Violation of the EU law as Constitutional Obligation] (Verfassungsblog, 26 January 2016<http://verfassungsblog.de/europarechtsbruch-als-verfassungspflicht-karlsruhe-zuendet-die-identitaetskontroll-bombe/ > accessed 9 September 2016; Julian Nowag, 'A New Solange Judgment from Germany – or Nothing to Worry About' (Voelkerrechtsblog, 22 March 2016) <http://voelkerrechtsblog.org/a-new-solange-judgment-from-germany-or-nothing-to-worry-about/> accessed 9 September 2016.

240 Rieke Krämer, 'Looking Through Different Glasses at the Lisbon Treaty: The German Constitutional Court and the Czech Constitutional Court' in Andreas Fischer-Lescano, Christian Joerges and Arndt Wonka (eds), The German Constitutional Court's Lisbon Ruling: Legal and Political-Science Perspectives (Centre of European Law and Politics, ZERP Discussion Paper 1/2010) 11, 18.

241 ÚS, Treaty of Lisbon II, 3 November 2009 Pl. ÚS 29/09. The Court has published a provisional English translation of the judgment at

Tribunal.[243] According to Daniel Sarmiento, such warning signals coming out from the member states should not only be regarded as a 'sign of nationalism', but also as confirmation of significance of the problems being addressed by the EU.[244]

By limiting the application of EU legal acts in the national legal system, the FCC confirmed that the authority of the CJEU as an exclusive adjudicator on EU law matters[245] will not be unconditionally accepted, and might even be challenged as long as there is a risk of abuse of power by European institutions. Even though it is difficult to avoid jurisdictional clashes between the courts, as the FCC considers the Basic Law as a standard for review whereas the CJEU observes the fundamental rights from the perspectives of EU law,[246] it has been argued that, to maintain their mutually supportive interaction, EU institutions would likely opt for coordination of their activities with the constitutional principles of the member states,[247] and the national authorities would be required to accept the supremacy of EU law.

1.3 Accession of the EU to the ECHR

The early commitment of the EC to the protection of fundamental rights can be seen in the case law of the ECJ from the very beginning of its existence. Although the authority of the ECJ in deciding human rights cases was challenged in the courts of the member states, the Court continued to show its adherence to the promotion of fundamental rights issues in order to preserve the supremacy of Community law.

Given that the absence of a uniform document of the fundamental rights at the Community level could endanger the position of individuals, the necessity of providing sufficient guarantees 'against Community authority' was evident.[248] Since all EU member states were

<http://www.usoud.cz/en/decisions/?tx_ttnews[tt_news]=466&cHash=eedba7ca14d226b879ccaf91a6dcb2> accessed 15 September 2015.

242 Corte Costituzionale, *Frontini v Ministero delle Finanze* Case 183/73 [1974] 2 CMLR 372.

243 TK, 2010.09.24, K 32/09.

244 Sarmiento (n 227).

245 Pliakos and Anagnostaras (n 61) 100.

246 Torsten Stein, 'La Protección de los Derechos Fundamentales a Través de los Tribunales de los Estados Miembros y el Tribunal de Justicia de las Comunidades Europeas*:* ¿Competencia o Cooperación?' [The Protection of Fundamental Rights through the Courts of the Member States and the Court of Justice of the European Communities: Competition or Cooperation?] (2008) Anuario de Derecho Constitucional Latinoamericano 419, 433.

247 Tomuschat (n 63) 279-280.

248 Rudolf Bernhardt, 'The Problems of Drawing up a Catalogue of Fundamental Rights for the European

already bound by the ECHR, the need to enhance the protection of fundamental rights either by including a catalogue of human rights,[249] or through accession of the EU to this international treaty, which was first discussed by the Commission in 1979, has emerged.[250] However, even though the Commission expressed strong confidence that adherence to fundamental rights and freedoms guaranteed under the ECHR could be beneficial, further consideration of the proposal was postponed for almost twenty years.

The most notable step was made in 1996 when the ECJ was asked to rule pursuant to Article 218(11) TFEU on the compatibility of accession with the Treaty.[251] Although negotiations were not begun, two main questions were raised before the ECJ: one on Community competence to conclude such agreements, and the other on the compatibility of accession with the provisions of the Treaty, in particular those relating to the jurisdiction of the ECJ.[252]

In approaching these issues, the ECJ referred to Article 3b of the Treaty, under which the Community was expected to operate 'within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it'.[253] The Court did not answer the second question because of insufficient information being available, but it held that, despite the lack of the Treaty provisions either 'to enact rules on human rights or to conclude international conventions in this field', Article 235 of the Treaty could not serve as a basis for widening the scope of Community powers.[254] Given that accession to the Convention might result in a modification of the system for the protection of human rights and would cause the 'entry of the Community into a distinct international institutional system and the integration of all provisions of the Convention into the Community legal order', it was pointed out that amendments to the Treaty would be required due to the constitutional significance.[255] Delivering its Opinion 2/94 on 28 March 1996, the ECJ did not allow the Community to join the ECHR.[256]

Communities: A Study Requested by the Commission' in Report of the Commission of 4 February 1976 submitted to the European Parliament and the Council (1976) EC Bull Supplement 5/76, 25.

249 Alysa J Ward, 'Case Comment: The Opinion of the Court of Justice Regarding Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Redirecting the Development of Fundamental Rights within the European Union' (1998) 27(635) Georgia J Intl & Comp L 635, 639.

250 Commission, Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, COM (79) 210, 2 May 1979.

251 *Opinion 2/94 on Accession by the Community to the European Convention for the Protection of Human RIghts and Fundamental Freedoms* [1996] ECR I-1759, paras 7, 9.

252 ibid [7], [9].

253 ibid [23].

254 ibid [20], [22], [27, [30].

255 ibid [35].

256 ibid [36].

The European Parliament's Resolution of 16 January 1997 on the general outline for a draft revision of the Treaties,[257] drew attention to the absence of both a legal basis for the accession of the EU to the Convention and the possibility of direct access to the ECJ by individuals if fundamental rights were violated by EC institutions, thus giving impetus to preparatory work aimed at incorporating the legal norms for the protection of human rights into the Treaties.

The ECJ's finding in *Nold,* which recognised the protection of fundamental rights guaranteed in the ECHR and constitutional traditions common to the member states, was codified in Article 6(2) of the Maastricht Treaty. Later, Article 7 of the Treaty of Amsterdam extended the competence of the Council in respect of Article 6(2) of the Maastricht Treaty by establishing the possibility of suspending certain rights of the member states in the event of a 'serious and persistent breach by a member state of principles in Article 6(1)'. [258] The jurisdiction of the ECJ to review the actions of Community institutions to ensure their compliance with Convention provisions and constitutional traditions was recognised in Article 46(d) of the Treaty of Amsterdam. All this made a significant contribution to the explicit consolidation and promotion of fundamental rights in the Treaties.

However, given that the acts of the EC were not covered by Article 1 ECHR, an overall protection of fundamental rights in the Community could not be assured, and the status quo could not be preserved because it was not possible to maintain the same level of legal certainty in the case law of the ECJ.[259] Even those proposals that were made were subject to criticism insofar as the accession of the EU to the Convention was not thought to provide stronger protection of fundamental rights than under the ECJ as those rights constituted general principles of EU law, and the Convention had already been ratified by all member states.[260] It was also argued that the incorporation of a catalogue of rights into the Treaty would jeopardise national sovereignty.[261] This situation in which EU citizens could be left without any protective mechanisms if the ECJ did not guarantee a sufficient level of protection of the fundamental rights needed to be resolved.

257 Parliament Resolution (EU) [1997] OJ C 33/66, para 3.

258 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/115 (Treaty of Amsterdam).

259 Ward (n 249) 648-649.

260 ibid: House of Lords Select Committee on the European Communities, 71st Report, 1979-80, HL 362; see also the arguments of France, Portugal, Spain, Ireland, and the United Kingdom in *Opinion 2/94* (n 177).

261 Patrick M Twomey, 'The European Union: Three Pillars without a Human Rights Foundation' in D O'Keeffe and P Twomey (eds), *Legal issues of the Maastricht Treaty* (Chancery Publications 1993) 125-126.

1.3.1 Adopting a catalogue of fundamental rights

In the absence of a single document detailing the fundamental rights in the Community, the number of diverging interpretations of the Convention rights could increase and thus discredit the reputation of both courts.[262] In *Hoechst AG v Commission*,[263] because Community law did not provide for greater protection of places of business against those guarantees envisaged by Article 8 of the Convention, the ECJ, being inspired by the ECtHR's ruling in *Niemetz v Germany*,[264] relied on the Strasbourg Court's approach by incorporating its interpretation of the Convention into its own jurisprudence.[265] Having emphasised that 'for the purposes of determining the scope of that principle [Article 8] in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in Hoechst', the ECJ adjudicated the case by extending the right of the inviolability of the home to places of business.[266]

To minimise conflicting interpretations of the Convention, there emerged the need to adopt a catalogue of fundamental rights that would broaden the scope of rights recognised in the ECHR and adapt them to the economic demands of the society. In view of this, President of the CJEU, Koen Lenaerts, suggested assigning the Convention a central place in any future document of fundamental rights within the EU, thereby preserving the legal orders of the contracting parties and the EC.[267]

In June 1999, the European Council[268] began drawing up of the EUCFR which was approved at the Nice European Council Summit on 7 December 2000.[269] As a minimum standard, the Charter allowed extensive use of national and international human rights instruments for the protection of EU citizens.[270] Since the EUCFR did not supersede the protection of fundamental rights provided by member states, it was applicable to the states when they were

262 Case 118/75 *Watson & Belmann* [1976] ECR 1185.
263 Joined Cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859.
264 *Niemietz v Germany* (1992) 16 EHRR 97.
265 Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-9011.
266 ibid [19], [20], [29].
267 Koen Lenaerts, 'Fundamental Rights to be Included in a Community Catalogue' (1991) 16(5) Eur L Rev 367, 367.
268 Council Decision (EU) on the drawing up of a Charter of Fundamental Rights of the European Union, Annex IV of the Conclusions of the Presidency of the Cologne European Council, 3 - 4 June 1999' <http://www.europarl.europa.eu/summits/kol2_en.htm#an4> accessed 7 September 2015.
269 European Council — Nice 7-10 December 2000, Conclusions of Presidency <http://www.europarl.europa.eu/summits/nice1_en.htm> accessed 7 September 2015.
270 EUCFR [2000] OJEC C 364/01, art 53.

enforcing EU law, otherwise those cases fell within their own jurisdiction.[271] Having incorporated not only all the rights under the ECHR, but also a list of modern rights that reflected the changes in the society, scientific and technological developments, and those rights that result from the constitutional traditions, the international treaties, Community treaties, and the case-law of the CJEU and of the ECtHR,[272] it eventually exceeded the scope of the Convention guarantees and, according to Georg Nolte and Helmut Philipp Aust, made a conciliatory move towards 'convergence between developments on the European and the universal level'.[273] Article 52(3) of the EUCFR stipulates that 'the meaning and scope of those rights shall be the same as those laid down by the said Convention'. This contributed considerably to the promotion of congruence in understanding of the Convention standards by the courts. Moreover, the insertion into the Preamble of the Charter the reference to the case-law of the ECtHR might signal a positive shift towards harmonisation of the interpretation of the Convention by the CJEU in accordance with the Strasbourg Court's jurisprudence.

The EUCFR, as a legal instrument aiming to ensure a comprehensive protection of fundamental rights within the EU against abuses committed by EU institutions, was intended to form the second part of the Draft Treaty Establishing a Constitution for Europe.[274] However, it never entered into force due to the failure in the ratification procedure,[275] and so its legal standing remained unclear, and it was referred to as a soft law[276] on an occasional basis.[277] For the first time in its practice, the Strasbourg Court sought support in this document when deciding *Christine Goodwin v the UK*.[278] By comparing Article 9 of the Charter with Article 12 of the Convention, the ECtHR acknowledged that, in defining the fundamental right to marry, the Charter has deliberately omitted reference to 'men and women'.[279] Having observed that since the adoption of the Convention the institute of marriage had undergone certain social changes, the ECtHR did not consider it reasonable to restrict same sex marriage

271 Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland und The Attorney General* [2012] ECR 2012.
272 EUCFR (n 55), Preamble; International Covenant on Social and Economic Rights (opened for signature 16 December 1966, entered into force 3 January 1976) UNTS 3.
273 Georg Nolte and Helmut Philipp Aust, 'European Exceptionalism?' (2013) 2(3) Global Constitutionalism 407, 427.
274 [2004] OJ C 310/1 (never ratified).
275 For further discussion see, eg, Francesca Vassallo, 'The Failed EU Constitution Referendums: The French Case in Perspective, 1992 and 2005' in Finn Laursen (ed), *The Rise and Fall of the EU's Constitutional Treaty* (Martinus Nijhoff Publishers 2008) 411-431.
276 Christoph Bush, 'Fundamental Rights and Private Law in the EU Member States' in Christoph Busch and Hans Schulte-Nölke (eds), *EU Compendium — Fundamental Rights and Private Law* (Sellier 2011) 4.
277 Timmermans (n 70) 154.
278 *Christine Goodwin v the UK* [GC] [2002] ECHR 2002-VI.
279 ibid [58], [100].

and left its regulation to the national laws of the contracting parties.[280] Given that Article 9 of the Charter provided for a more extensive protection of the right to marry, the Court decided the case relying on its provisions. Such mutually beneficial cooperation, according to former judge at the ECJ, Christiaan Timmermans, confirms a tangible advance in strengthening the legitimacy of both courts.[281]

In 2009, when the Lisbon Treaty entered into force, the legal status of the Charter was clarified. Under Article 6(1) it was given the same status as the Treaties, and the Commission endorsed a strategy on its effective implementation.[282] Compliance with the strategy's goals would be monitored through annual reports of the Commission drawing on case-law from the CJEU, ECtHR and national courts.[283] The Fifth Annual Report[284] showed that from the time the EUCFR has obtained mandatory status there has been an increasing rate of reference to it in the work of the EU institutions, particularly the CJEU, [285] which may indicate a 'growth of the Court's role as a human rights adjudicator'.[286] The same positive tendency to invoke the provisions of the EUCFR has been seen in the jurisprudence of the national courts which, in submitting their requests for a preliminary ruling procedure to the CJEU, referred to it in 43 cases in 2014[287] in comparison with only 18 in 2010.[288] This confirms that the domestic courts are playing a significant role in achieving a uniform interpretation of the fundamental rights enshrined in the Charter when implementing EU law.

The European Commission, as the institution responsible for ensuring the effective application of the Charter, is authorised to initiate infringement proceedings under Article 258 TFEU against member states for non-compliance with the provisions of the EUCFR, which may result in bringing the case before the CJEU. Such proceedings have been opened in

280 ibid [102]-[104]
281 Timmermans (n 70) 153-154.
282 Commission, Communication on the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM (2010)573, 19 October 2010, 3.
283 Annual Reports of the Commission available at <http://ec.europa.eu/justice/fundamental-rights/charter/application/index_en.htm> accessed 17 August 2015.
284 Commission, Report 2014 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of the EU Charter of Fundamental Rights, COM(2015)191, 8 May 2015.
285 ibid 2: it was referred to in 210 decisions of the CJEU in 2014, 113 in 2013, 87 in 2012, 43 in 2011 and 27 in 201.
286 De Búrca (n 14) 169.
287 Report 2014 (n 284), Annex II 'Overview of the applications for preliminary rulings submitted in 2014 which refer to the Charter' in the Commission staff working document on the Application of the EU Charter of Fundamental Rights in 2014, 173-176.
288 Commission, Report 2011 on the application of the EU Charter of Fundamental Rights, COM(2012)169, 16 April 2012, 8.

several cases.[289] On 7 June 2012, the Commission brought the action before the Court of Justice claiming that the national scheme reducing the compulsory retirement age for judges, prosecutors and notaries was incompatible with the provisions of the Charter and the Council Directive of 27 November 2000 on equal treatment that forbade discrimination as regards employment or occupation on the grounds of age.[290] Soon after the Court of Justice handed down its ruling in November 2012,[291] Hungary adopted necessary measures[292] to bring the national legislation in line with the EU standards, because of which the infringement proceeding was terminated in November 2013.[293]

One would not doubt that the Charter has contributed significantly to the harmonisation of national legislation with EU law. However, given that the ECHR was not binding on the EU, it was not systematically considered by the CJEU in interpreting fundamental rights under the EUCFR.[294] Since this variation might have a delegitimising effect on the CJEU's position,[295] it was important to avoid any inconsistencies in courts' practices[296] and to develop a coherent system of fundamental rights protection. For that very reason, debates on accession of the EU to the Convention were expected to recommence.

1.3.2 Negotiation process

The Memorandum of Understanding between the CoE and the EU concluded in May 2007 stated that early accession of the EU to the ECHR would strengthen human rights protection in Europe.[297] The negotiation Directives recommended by the Commission in March 2010[298] opened the way for a discussion of the Agreement on EU accession to the Convention, and official confirmation of the mandate of the Commission in June 2010 heralded the beginning of joint debates.[299] At a meeting held in Strasbourg in the following month,[300] former Vice-

289 Report 2014 (n 284) 11-12.
290 Directive 2000/78/EC (n 195), art 1.
291 Case C-286/12 *European Commission v Hungary* [2012] ECR I-237.
292 Act XX of 11 March 2013 amending Act CLXII of 2011.
293 Commission, Press Release 'European Commission closes infringement procedure on forced retirement of Hungarian judges', IP-13-1112, 20 November 2013.
294 De Búrca (n 14) 175.
295 Scheeck (n 81) 6.
296 Spielmann (n 79) 777.
297 CM, Memorandum of Understanding between the Council of Europe and the European Union, CM(2007)74, 10 May 2007, para 20.
298 Commission, Press Release 'European Commission acts to bolster the EU's system of protecting fundamental rights', IP/10/291, 17 March 2010.
299 Council Decision (EU) 10817/10 of 4 June 2010 authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the Protection of Human Rights and

President of the European Commission, Viviane Reding, and Secretary General of the CoE, Thorbjørn Jagland, highlighted that the EUCFR was a 'good precondition' for the establishment of the 'missing link in Europe's system of fundamental rights protection, guaranteeing the coherence between the approaches' of the negotiating partners.[301]

On 26 May 2010, the Steering Committee for Human Rights (CDDH) was granted an *ad hoc* mandate by the Committee of Ministers[302] to draw up legal instruments for the accession of the EU to the Convention no later than 30 June 2011, and an informal working group drafted an agreement and supporting documents for the supervision of the execution of judgments of the ECtHR.[303] The Report of the CDDH of 14 October 2011 stressed that, in light of the 'specific legal order of the European Union', accession of the EU to the Convention would require amendments to the Treaties.[304]

The ability of the EU to conclude agreements with international organisations was envisaged by Article 216 of the Lisbon Treaty, and the obligation of the EU to join the Convention was established by Article 6(2) and Protocol No 8 of the Lisbon Treaty,[305] and Article 59(2) and Protocol No 14[306] of the Convention eventually comprised the legal basis for EU accession. In 2012 the Committee of Ministers instructed the CDDH to proceed with the negotiations with the EU in *ad hoc* group,[307] and agreement on draft revised instruments was achieved in April 2013.[308]

Fundamental Freedoms (ECHR), 10602/10 is classified, a partially declassified version was made public on 8 June 2010.

300 CDDH, Report on the accession of the EU to the ECHR with the European Commission, CDDH-UE(2010)05, 7 July 2010.

301 Commission, Press Release 'European Commission and Council of Europe kick off joint talks on EU's accession to the Convention on Human Rights', IP/10/906, 7 July 2010.

302 CM, Decision on ad hoc terms of reference for the Steering Committee for Human Rights (CDDH) to elaborate a legal instrument setting out the modalities of accession of the European Union to the European Convention on Human Rights, CM/882, 26 May 2010.

303 CDDH, Draft legal instruments on the accession of the EU to the ECHR, CDDH-UE(2011)16, 19 July 2011.

304 CDDH, Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights, CDDH(2011)009, 14 October 2011.

305 Protocol No 8 relating to Article 6 (2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms in the Consolidated Version of the Treaty on the European Union [2012] OJ C 326/273.

306 Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of Convention (opened for signature 13 May 2004, entered into force 1 June 2010) CETS No 194.

307 CM, Decisions of the 1145th meeting of the Ministers' Deputies (13 June 2012) 47+1(2012)001 bil CM/Del/Dec(2012)1145, 4 July 2012.

308 CDDH-UE, Final Report to CDDH on the accession of the EU to the ECHR (Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission) document 47+1(2013)008rev2, 5 April 2013, para 9.

1.3.3 Opinion 2/13 of the CJEU

In view of the constitutional significance of the accession,[309] in accordance with Article 218(11) TFEU, the European Commission asked the CJEU to express its opinion on the compatibility of the draft Agreement with the Treaties.

1.3.3.1 Prior involvement procedure

Delivering its opinion on 18 December 2014, the Court of Justice acknowledged the incompatibility of the Draft Accession Agreement (DAA)[310] with Article 6(2) TEU, explaining the potential negative effect that it might have on the autonomy and specific characteristics of the EU.[311] There were a number of controversial aspects identified. First, a prior involvement procedure in cases in which the EU would be a co-respondent was mentioned, as foreseen by Article 3(6) DAA. Having accentuated the importance of preserving 'the competences of the Union or the powers of its institutions' as required by Article 2 of Protocol No 8 to the Lisbon Treaty, the Court of Justice expressed its discontent over the absence of any provisions in the DAA that would exclude the possibility of prior adjudication of issues concerning EU law by the Strasbourg Court.[312] It was suggested to ensure that the EU was aware of all cases pending before the ECtHR to secure the prior involvement of the CJEU in the procedure on compatibility of EU law with the provisions of the Convention or Protocols, to which the EU will be a Party.[313]

From the CJEU's point of view, limiting its power to rule only on the validity of a legal norm contained in secondary law[314] would not preserve its exclusive competence to interpret EU

309 AG Kokott View in *Opinion 2/13 of the Court on Accession by the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Compatibility of the draft agreement with the EU and FEU Treaties* (18 December 2014) delivered on 13 June 2014, para 8. English translation of the judgment at <http://curia.europa.eu/juris/document/document.jsf?docid=160929&doclang=EN> accessed 15 October 2015. References in this work refer to paragraphs of this translation.

310 Final report to CDDH (n 308), Appendix I Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (DAA).

311 *Opinion 2/13* (n 16), para 258.

312 ibid [240].

313 ibid [241]-[242].

314 Final report to CDDH (n 308), Appendix V Draft explanatory report to the agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, paras 65-66 (Draft Explanatory Report).

law.[315] It was argued that efficient operation of EU judicial system could be guaranteed if EU secondary law would also be subject to interpretation by the CJEU on its compliance with the commitments of the EU resulting from the accession to the Convention.[316]

It may seem surprising that the Strasbourg Court would be asked to adjudicate on the conformity of an EU act with the norms of the ECHR, even if the ruling of the CJEU had not initially been obtained.[317] Although such scenario should not be excluded, this would be equated to 'conferring on the ECtHR the jurisdiction to interpret the case-law of the Court of Justice'.[318] Given that under Article 267(3) TFEU, national courts are required to bring the matter before the CJEU only if there is no judicial remedy under national law against its decisions, the Strasbourg Court will apparently not consider the preliminary ruling procedure as an effective remedy within the meaning of Article 35(1) of the Convention. It is thus reasonable, since the individuals are not allowed to initiate such requests directly, to oblige domestic courts to turn to the CJEU for a preliminary ruling in any case dealing with EU law which will be submitted to the ECtHR.

Christiaan Timmermans believes that the CJEU must be able to examine the question at first hand.[319] Being an avenue which must be exhausted under Article 35(1) of the Convention, it has to be available to individuals so as not to deprive them of access to the Strasbourg machinery. In view of this, Advocate General Kokott proposed ensuring the ECtHR's role as a subsidiary control mechanism under the ECHR to preserve authority of the CJEU as the 'only reliable' to assess the compatibility of EU law with the fundamental rights under the Convention.[320]

1.3.3.2 Protocol No 16 to the Convention[321]

In light of need to secure the autonomy of the preliminary ruling procedure envisaged by Article 267 TFEU, the Court of Justice considered that Protocol No 16, which introduced the advisory opinion mechanism for the highest courts of the contracting parties to refer questions

315 *Opinion 2/13* (n 16), para 246.
316 ibid [236], [243], [244].
317 Draft Explanatory Report (n 214), para 65.
318 *Opinion 2/13* (n 16), para 239.
319 Timmermans (n 70) 158.
320 AG Kokott in *Opinion 2/13* (n 309), paras 19, 183.
321 Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 2 October 2013) CETS No 214.

on the interpretation of the fundamental rights and freedoms guaranteed by the Convention or Protocols to the Strasbourg Court, might threaten the effectiveness of the procedure embedded in the judicial system under the Treaties.[322] Although Protocol No 16 is facultative in nature, and DAA does not anticipate its further ratification by the EU, Kokott argued that those member states which would become a party to it may be inspired to file a request for an advisory opinion on EU fundamental rights to the ECtHR rather than the CJEU.[323] The lack of explicit formulation in DAA of the relationship between these mechanisms could affect the supreme authority of the CJEU to interpret EU law.[324] Therefore, to avoid this challenging situation the issue of the CJEU's prior involvement discussed earlier should initially be regulated.

1.3.3.3 Article 344 TFEU

The CJEU also expressed concern with the formulation of Article 5 DAA as contradicting Article 344 TFEU which restricted submission of a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those allowed by the Treaties.[325] The Court of Justice pointed out that even if Article 5 of the Agreement did not recognise the proceedings before the CJEU as a means of conflict resolution within the meaning of Article 55 of the ECHR, it reserved the possibility for the member states or the EU to refer to the ECtHR under Article 33 of the ECHR.[326] In view of this, the Court of Justice was convinced that only the exclusion of the ECtHR's authority over any such disputes will avoid collision with the objectives of Article 344 TFEU and Article 3 of Protocol No 8 to the Lisbon Treaty, and preserve the exclusive jurisdiction of the CJEU to adjudicate disputes between member states, and between member states and the EU on compliance with the ECHR.[327]

The Advocate General proposed that the EU and the member states at the time of EU's accession to the Convention declare their intention not to bring a case against each other before the ECtHR under Article 33 if it concerned matters of EU law, on pain of infringement

322 *Opinion 2/13* (n 16), paras 196, 199.
323 AG Kokott in *Opinion 2/13* (n 309), paras 138, 139.
324 *Opinion 2/13* (n 16), para 199.
325 ibid [214].
326 ibid [207].
327 ibid [213], [204].

proceedings under Articles 258 to 260 TFEU.[328]

1.3.3.4 Co-respondent mechanism

Article 1(b) of Protocol No 8 to the Lisbon Treaty describes the co-respondent mechanism, which is an instrument to 'ensure that […] individual applications are correctly addressed to member states and/ or the Union, as appropriate' and 'avoid gaps in participation, accountability and enforceability in the Convention system',[329] anticipating accession of the EU to the ECHR. The Court of Justice expressed its discomfort with the authority of the Strasbourg Court to decide on requests of member states to become co-respondents.[330] Since the conditions to be met for their participation were established in the 'rules of EU law concerning the division of powers between the EU and its member states',[331] this would entail a review by the ECtHR of EU law.

From the point of view of the Court of Justice, such assessment of the plausibility of states' arguments would affect the distribution of powers between the EU and the member states[332] in much the same way as would be the case in the context of Article 3(7) DAA, which permitted the ECtHR to rule on the question of sharing liability between the respondent and co-respondent by holding only one responsible for the Convention violation.[333] The Court of Justice argued that any exemption from liability must be made in accordance with EU law and be subject to supervision by the CJEU, which has the exclusive competence to decide on the compatibility of the agreement between the respondent and co-respondent with the relevant rules of EU law.[334]

Advocate General Kokott stressed that such a discretionary power of the ECtHR to decide on the admission of co-respondents could make their further participation in this procedure uncertain.[335] Since the co-respondent mechanism in its present form disregarded specific characteristics of the EU and EU law,[336] it was proposed for the purpose of effective

328 AG Kokott in *Opinion 2/13* (n 309), paras 118, 120.
329 Draft Explanatory Report (n 314), para 39.
330 DAA (n 310), art 3 (5).
331 *Opinion 2/13* (n 16), para 221.
332 ibid [225].
333 ibid [231].
334 ibid [234].
335 AG Kokott in *Opinion 2/13* (n 309), para 230.
336 *Opinion 2/13* (n 16), para 235.

communication of potential co-respondents to exclude the assessment criteria envisaged by Article 3(5) DAA.[337]

1.3.3.5 Common Foreign and Security Policy (CFSP)

The main concern of the CJEU, according to Koen Lenaerts, related to the need to safeguarding the autonomy of the EU legal order in the area of CFSP[338] in which the CJEU, pursuant to Article 24(1) TEU and Article 275 TFEU, has a limited authority.[339] Given that the main responsibility for any infringements of the ECHR within the CFSP lies with the courts and tribunals of member states in accordance with Article 19(1) TEU and Article 274 TFEU, there is a danger that 'serious tension with the constitutional idea of Union' might arise.[340] It seems thus reasonable that, if the CJEU is competent under the Treaties to interpret EU law in the context of the CFSP, its prior involvement in the examination of those cases should be guaranteed.[341]

Under DAA, on EU accession to the ECHR, the ECtHR will be responsible for examining acts of EU institutions as to compatibility with the ECHR, including in the area of CFSP.[342] It will eventually be competent to hold EU to account for any violations stemming from the ECHR, covering even those that the CJEU was not empowered to examine.[343] Daniel Halberstam has argued that the Strasbourg Court, having acquired this power, will become the 'European Union's constitutional court'.[344] The main question this raises is whether the EU would recognise such jurisdiction of the ECtHR, and to what extent it correlates with the autonomy of EU law.[345] The CJEU opined that a review of EU acts, even if limited to compliance with the Convention rights, could not be entrusted to a non-EU body which

337 AG Kokott in *Opinion 2/13* (n 309), para 235.
338 Interview with Koen Lenaerts, President of the CJEU, within the frame of the Annual ICON Conference 'Borders, Otherness, and Public Law' (Humboldt University of Berlin, 17-19 June 2016).
339 Art 24(1) TEU: 'the jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union', Art 275(2) TFEU: 'the Court shall have jurisdiction […] to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decision providing for restrictive measured against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union'.
340 Daniel Halberstam, ''It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 German LJ 105, 142.
341 AG Kokott in *Opinion 2/13* (n 309), para 188.
342 *Opinion 2/13* (n 16), para 254.
343 AG Kokott in *Opinion 2/13* (309), para 187.
344 Halberstam (340) 145.
345 AG Kokott in *Opinion 2/13* (309), para 189.

operates outside the judicial framework of the EU.[346] It was concluded that DAA did not take into consideration specific characteristics of the EU legal system as regards the judicial review of the acts and actions by the EU within the framework of the CFSP.[347]

Kokott has emphasised that, because the principle of autonomy of EU law presumes that in the event of EU's accession to the ECHR, the powers of EU institutions remain untouched and any interpretation of EU law given by international court would not affect the EU legal order,[348] there would be no threat to the supranational structure of the EU if the jurisdiction of the Strasbourg Court in this sphere was subsequently to be recognised.[349] Even the lack of necessary adjustments within the EU required to secure the autonomy of EU law should not call into question the necessity to acknowledge the jurisdiction of an international court as it may strengthen the legal protection of individuals.[350]

Given that the CJEU has not ruled so far on the extent of its authority within the CFSP,[351] remaining uncertainties may give rise to jurisdictional conflicts between the courts. To avoid this problem, it is of utmost importance to ensure the exclusive jurisdiction of the CJEU over all disputes, including those originating from the CFSP, that are forwarded to the Strasbourg Court.[352]

There is little doubt that, in declaring the incompatibility of DAA with Protocol No 8,[353] the CJEU intended to preserve the autonomy of the EU and was inspired by the idea of excluding any intrusion into the sphere of exclusive competences of EU institutions rather than by the idea of mutual collaboration with the ECtHR to enhance the effectiveness of fundamental rights protection. In light of the obligation imposed on the EU under Article 6(2) TEU to accede to the ECHR, a friendlier approach to future accession which would address the concerns raised by the CJEU would seem prudent.

346 *Opinion 2/13* (n 16), para 255, 256; Opinion 1/09 [2011] OJ C211/28 on the draft agreement establishing a European Patent Court, paras 78, 80 and 89.
347 *Opinion 2/13* (n 16), para 257.
348 AG Kokott in *Opinion 2/13* (n 309), paras 172, 192; Opinion 1/00 (European Common Aviation Area) [2002] ECR I-3493, paras 11-13; see also, Opinion 1/91Agreement between the Community and the EFTA on an European Economic Area I [1991] ECR I-6079, paras 41-46 and 61-65, and Opinion 1/92 EEA II [1992] ECR I-2821, paras 32, 41.
349 AG Kokott in *Opinion 2/13* (n 309), para 191.
350 ibid [193].
351 *Opinion 2/13* (n 16), para 251.
352 Daniel Halberstam, 'Foreign Policy and the Luxembourg Court: How to Address a Key Roadblock to EU Accession to the ECHR' (Verfassungsblog on Matters Constitutional, 12 June 2015) <http://verfassungsblog.de/foreign-policy-and-the-luxembourg-court-how-to-address-a-key-roadblock-to-eu-accession-to-the-echr/> accessed 17 August 2016.
353 *Opinion 2/13* (n 16), para 258.

1.3.4 Prospects of accession: relationship between the CJEU and the ECtHR

Being perceived as a threat to the 'idea of a unified European human rights law architecture', Opinion 2/13 of the CJEU caused a wave of negative comments within the legal community.[354] Former President of the Strasbourg Court, Dean Spielmann, has argued that the CJEU's 'unfavourable opinion is a great disappointment' as it slowed down the process of EU adherence to the standards of fundamental rights protection envisaged by the ECHR.[355] Given that currently the citizens are deprived of the right to subject the acts of the EU to the same external judicial control which is applied to the member states, he argued that it is important to overcome the challenges outlined by the CJEU and not to view them as an obstacle to EU accession.[356]

Despite concerns expressed on a number of draft's provisions, Kokott presumed it more practical to declare DAA compatible with the Treaties in case adjustments that would likely preserve specific characteristics of the EU's legal order are introduced as required in Opinion 2/13.[357] Koen Lenaerts, President of the CJEU, strongly supported the necessity for finalising accession negotiations.[358] He emphasised that under no circumstances could the accession be considered redundant; on the contrary: 'external review by the Strasbourg Court will be of great advantage' for bridging the gap between the EU and the ECHR in the protection of fundamental rights in Europe, and Guido Raimondi, President of the ECtHR, proposed to work with the CJEU to proceed with the accession.[359]

According to Article 218(11) TFEU, if the opinion of the CJEU is adverse, the agreement may not enter into force unless corresponding amendments are introduced or the Treaties are revised. The negotiations between the parties to reach consensus on the provisions of the Accession Agreement should thus continue. A more radical approach was proposed by Leonard Besselink, who recommended an amending Protocol to the TEU which would authorise the accession 'notwithstanding' Opinion 2/13.[360] This would completely subvert the

354 Korenica (n 72) 434.
355 ECtHR, Annual Report (2014) 6 <http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf> accessed 17 September 2015.
356 ibid 36.
357 AG Kokott in *Opinion 2/13* (309), para 279.
358 Interview with Lenaerts (n 338).
359 Interview with Guido Raimondi, President of the ECtHR, within the frame of the Annual ICON Conference 'Borders, Otherness, and Public Law' (Humboldt University of Berlin, 17-19 June 2016).
360 Leonard Besselink, 'Acceding to the ECHR Notwithstanding the Court of Justice Opinion 2/13' (Verfassungsblog, 23 December 2014) <http://acelg.blogactiv.eu/2014/12/24/acceding-to-the-echr-

CJEU's authority, and Pieter Jan Kuijper has invited to show 'some good will to the Court' by modifying DAA to accommodate those problems articulated by the CJEU.[361]

Opinion 2/13 highlights the concern that EU accession might challenge the autonomy of the Union's legal order, as the ECtHR would be allowed to supervise the compliance of EU legislation with the Convention.[362] It is widely discussed in the academic literature that, having acquired a 'vertically integrated but cooperative' nature, the relationship between the two European courts will be changed.[363] Fisnik Korenica referred to the hierarchisation, viewing the CJEU in the role of the constitutional domestic court of the EU, and the ECtHR as a 'supreme court' in respect of the CJEU.[364]

Christian Timmermans was convinced that the ECtHR would be the ultimate adjudicator as regards infringements stemming from the ECHR.[365] Relying on Article 35(1) of the Convention, which would require the CJEU to deal with the case before it was referred to the ECtHR, Kirsten Schmalenbach has also opined that the Strasbourg Court would always decide the case in the last instance by examining whether the CJEU had correctly interpreted the Convention rights.[366]

Given the subsidiary nature of the ECHR mechanism, the Strasbourg Court will not, however, have direct authority over the CJEU as it does not have the power to repeal EU law that had been found incompatible with the ECHR.[367] This would mean that such an external control represents a fragile system of appeal. The CJEU will remain unique in its exercise of judicial review in cases that come before the ECtHR and its competence would not be affected, and

notwithstanding-the-court-of-justice-opinion-213/> accessed 7 July 2015. According to Besselink the following text would be advisable: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6 (2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014'.

361 Pieter Jan Kuijper, 'Reaction to Leonard Besselink's ACELG Blog' (Amsterdam Centre for European Law and Governance Blog, 6 January 2015) <https://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks's-acelg-blog/ >accessed 17 January 2016.

362 Morano-Foadi (n 71) 30.

363 Korenica (n 72) 434-435.

364 ibid 432.

365 Christiaan Timmermans, 'Will the Accession of the EU to the European Convention on Human Rights Fundamentally Change the Relationship between the Luxemburg and the Strasbourg Courts?' (Speech delivered at the Conference 'Judicial Cooperation in Private Law', Florence Centre for Judicial Cooperation, 15-16 April 2013) CJC DL 2014/01,16.

366 Kirsten Schmalenbach, 'Struggle for Exclusiveness: The ECJ and Competing International Tribunals' in Gerhard Hafner and Isabelle Buffard (eds), *International Law Between Universalism and Fragmentation* (Martinus Nijhoff Publishers 2008) 1066.

367 Wetzel (n 71) 2848.

the autonomous legal order of the EU would be secured in much the same way as that of each contracting party to the Convention.

1.4 The equivalent protection doctrine in the jurisprudence of the ECtHR

Given that the accession of the EU to the ECHR is still pending, the effective protection of fundamental rights cannot be completely assured, and so it is important to establish constructive dialogue between the CoE and the EU that will exclude any jurisdictional tensions between the CJEU and the ECtHR, safeguard the supremacy of EU law, and guarantee individuals equal or higher standards of fundamental rights protection than those enshrined in the ECHR.[368] To achieve this, the Strasbourg Court has announced that it will not exercise its competence to review cases brought against the EU, but has reserved the right to review the acts and omissions of EU institutions indirectly by holding member states responsible for implementing EU measures.[369]

By transferring powers to the EU, national governments widened the competence of the Union in the field of human rights. Despite this, the European Commission of Human Rights held in *X v Federal Republic of Germany* that:

> 'when a member state, having submitted itself to contractual obligations, concludes a later international agreement that does not allow for further observations of its obligations under the earlier Treaty, the state still is responsible under the preceding Treaty'.[370]

The EU, not being a signatory to the ECHR, did not have any responsibility under this international treaty.[371] The cases involving the EU were subsequently regarded by the Commission as *ratione personae* inadmissible,[372] and this gave rise to the concept of equivalent protection that was first presented in *M & Co v Federal Republic of Germany.*[373]

368 ibid 2861.
369 Halberstam (n 340) 134.
370 *X v Federal Republic of Germany* App no 235/56 (Commission Decision, 10 June 1958) 2 YB 256.
371 Hert and Korenica (n 74) 877.
372 *Confédération Française Démocratique du Travail (CFDT) v European Communities* App no 8030/77 (Commission Decision, 10 July 1978) 13 DR 235, para 3.
373 *M & Co v Federal Republic of Germany* App No 13258/ 87 (Commission Decision, 9 February 1990) 64 DR 138.

This was a case which dealt with the enforcement of the Commision's decision of 14 December 1979[374] to impose a fine for a breach of Article 101 TFEU on a German company importing equipment which was produced by a Japanese firm in a manner which restricted competition. The respondent Government argued that it was not responsible for examining before issuing a writ for the execution of a judgment of the ECJ whether it had been rendered in violation of the Convention rights enshrined in Article 6.

The responsibility of Germany could not result from this treaty, as all Community acts would have fallen then under the Convention's control machinery. However, the exercise of transferred in this sphere powers to the EC did not exclude the state liability under Article 1 of the ECHR for all acts of their domestic organs infringing the Convention provisions, otherwise it would have undermined the effectiveness of enshrined therein guarantees.[375] In view of this, the European Commission of Human Rights affirmed that 'the transfer of powers to an international organisation was not compatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection'.[376]

When evaluating whether the EC afforded such protection, the European Commission of Human Rights, relying on the case law of the ECJ and the commitment of the Parliament, the Council and the Commission of the EC to the protection of human rights, concluded that a sufficient level of guarantees of individuals has been provided.[377] Since it was presumed that the Community legal order ensured efficient protection of fundamental rights, no judicial review of the compatibility of the acts of EU institutions with the ECHR was allowed if no discretion was left to member states over their enforcement. The European Commission for Human Rights acknowledged that it was 'not competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities, the latter not being a Party to the European Convention on Human Rights'.[378]

374 Commission Decision No 80/256/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/29.595 – Pioneer Hi-Fi Equipment) [1979] OJ L60/21.
375 *M & Co* (n 373), s 'the Law'.
376 ibid.
377 Joint Declaration (EC) 5 April 1977 (n 137).
378 *M & Co* (n 373).

1.4.1 *Matthews v United Kingdom*[379]

In *Matthews*, the Strasbourg Court has explicitly reaffirmed the necessity of securing the Convention rights, even after the transfer of powers to international organisation. The case deals with the issue of voting rights in European Parliament elections. The applicant, a British citizen resident in Gibraltar, claimed a violation of Article 3 of Protocol No 1 to the ECHR in that she was not allowed to vote in the elections in 1994. Referring to Decision of the Council 76/787/ECSC[380] and the Act of 1976,[381] the applicant challenged the limitations on the right to vote set out in Annex II to this Act which had the status of a treaty which the United Kingdom has freely joined.[382] Given that the alleged violation stemmed from the Community primary law over which the ECJ did not have jurisdiction[383] the ECtHR could not invoke the doctrine of equivalent protection.

Because the Convention had been extended to Gibraltar by declaration of the United Kingdom on 23 October 1953,[384] and Protocol No 1 had been applicable in Gibraltar since 25 February 1988,[385] there was territorial jurisdiction under Article 1 ECHR. Therefore, those obligations resulting from the Act of 1976 and the Maastricht Treaty that brought about changes in the competences of the European Parliament were binding on the United Kingdom pursuant to Article 1 of the Convention and Article 3 of Protocol No 1.[386] The European Commission of Human Rights held that, although the EC was not a contracting party to the Convention and its acts could not be referred to the ECtHR, member states continued to carry responsibility for any violation under the Convention even after having transferred powers to the international organisation as long as it related to the EC primary law.[387] The United Kingdom

379 *Matthews v United Kingdom* [1999] ECHR 1999-I.
380 Decision 76/787/ECSC, EEC, Euratom relating to the Act concerning the election of the representatives of the Assembly by direct iniversal suffrage [1976] OJ L 278/1.
381 Act concerning the election of the representatives of the Assembly by the direct universal suffrage [1976] OJ L 278/5.
382 ibid, Annex II to the 1976 Act states that 'The United Kingdom will apply the provisions of this Act only in respect of the United Kingdo''; art 15 reads as follows: 'Annexes I to III shall form an integral part of this Act'.
383 See, Gragl (n 73) 125-126; TFEU (n 102), art 267.
384 Declaration contained in a letter from the Permanent Representative, 23 October 1953; List of Declarations made with respect to treaty No 005 <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?CL=ENG&CM=9&NT=005&VL=1&PO=UK> accessed 7 July 2015.
385 Declaration contained in a letter from the Permanent Representative, 22 February 1988; List of Declarations made with respect to treaty No 009 <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?CL=ENG&NT=009&VL=1> accessed 17 March 2015.
386 *Matthews* (n 379), para 33.
387 ibid [32].

was thus found to be in breach of Article 3 of Protocol No 1 for not securing the right to free elections in Gibraltar and was obliged to amend its legislation to meet the Convention requirements.[388]

In reviewing the acts of the Community indirectly by scrutinising those measures adopted at the national level, the ECtHR established its authority over claims stemming from Community primary law. Since no other mechanism against violations originating therefrom existed, the ECtHR would continue to retain its role as a principal observer of the Convention rights in Europe, but maintaining the application of equivalent protection doctrine (see below), which was intended to limit the jurisdiction of the Strasbourg Court in respect of any alleged violations resulting from EU secondary legislation.

1.4.2 *Bosphorus v Ireland*[389]

Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland clarified how the relationship between the ECHR and EU law is currently regulated. It concerned the seizure by the Irish authorities of aircraft leased by a Turkish company, Bosphorus Airways, from Yugoslav Airlines[390] under the sanctions imposed by the UN Security Council on the Former Republic of Yugoslavia (FRY) pursuant to Resolution 820 (1993)[391] adopted under Chapter VII of the UN Charter.[392] The Council implemented it through Regulation No 990/93 concerning trade between the EEC and the FRY (Serbia and Montenegro).[393]

Bosphorus Airways challenged the applicability of Article 8 of the Council Regulation before the Irish High Court, which recognised the decision of the Minister to impound the aircraft *ultra vires*.[394] On appeal from Ireland's Ministry of Transport, the Supreme Court was asked to refer the issue for preliminary ruling to the ECJ to determine whether Article 8 of the Regulation No 990/93 could be invoked in respect of an aircraft,

> 'which is owned by an undertaking the majority or controlling interest in

388 ibid [65].
389 *Bosphorus* (n 37).
390 ibid [14], [16].
391 UN Security Council, Resolution 820 (1993) on the situation in Bosnia and Herzegovina, S/RES/820, 17 April 1993.
392 Charter of the UN (opened for signature 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
393 Council Regulation (EEC) No 990/93 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L102/14.
394 *Bosphorus* (n 37), paras 35-36.

> which is held by an undertaking in the Former Republic of Yugoslavia (Serbia and Montenegro) where such aircraft has been leased by the owner for a term of four years from 22 April 1992 to an undertaking the majority or controlling interest in which is not held by a person or undertaking in or operating from the said Federal Republic of Yugoslavia (Serbia and Montenegro)'.[395]

Having not considered the impounding as 'inappropriate or disproportionate', the ECJ justified the application of Article 8 of the Regulation by the general interest of the international community to bringing an end to the armed conflict and violations of human rights and international humanitarian law in the Republic of Bosnia-Herzegovina.[396] The Supreme Court, affirming in its judgment of 29 November 1996 the binding nature of the ECJ decision, allowed the appeal of the Ministry of Transport.[397]

Claiming a violation of a right under Article 1 of Protocol No 1 to the Convention to the peaceful enjoyment of possessions, the applicant filed a complaint with the European Commission of Human Rights in March 1997, which was forwarded to the Strasbourg Court in November 1998[398] when Protocol No 11[399] came into effect. The ECtHR had to determine whether the actions of the state should be qualified as voluntary, as argued by the petitioner, or an obligation resulting from membership of an international organisation.[400] If the latter, this would have entailed the need to evaluate the equivalence of the human rights protection.

The government of Ireland argued that, for the purpose of adhering to its international obligations, it was obliged to comply with the Security Council Resolution and implement the EC Regulation that constituted a lawful basis for a such interference.[401] Given that it was important to preserve the distinctive nature of the EC and its legal system, the Strasbourg Court while awaiting the accession of the EU to the ECHR decided to follow the approach applied in *M & Co.*[402] By acknowledging that the fundamental rights in the examined organisation were secured in a manner which could be considered 'at least equivalent' to that provided by the Convention, the Court held that the respondent state did not infringe the

395 Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* [1996] ECR I-3953, para 7.
396 ibid [26], [27].
397 *Bosphorus* (n 37), paras 58, 125.
398 ibid [3], [4].
399 Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (opened for signature 11 May 1994, entered into force 11 November 1998) CETS No 155.
400 *Bosphorus* (n 37), para 109.
401 ibid [110] –[113].
402 ibid [122]-[123].

requirements of the ECHR when giving effect to its obligations originating from membership of the EC.[403] The Strasbourg Court clarified that 'equivalent' meant 'comparable', which did not imply 'identical' protection as it was not intended to substitute entirely the protection under the ECHR, but was focused on achieving the similar results in the interests of the international cooperation.[404]

The responsibility of the state under the Convention could only be invoked if it operated within the discretion conferred on it by the international organisation, the compatibility of which with the ECHR might be controlled by the Convention institutions.[405] If the existence of such discretion was not identified, the ECtHR would need to decide whether the equivalent protection doctrine was applicable to a given case. Any of finding on equivalence would be subject to control by the ECtHR with a view to revealing probable changes in the protection of the fundamental rights.[406] The state would be presumed to be acting within the scope of the Convention obligations when implementing Community law, and the acts of the EC would be exempt from conformity review by the Strasbourg Court, as long as this protection did not prove to be 'manifestly deficient'.[407] Should this happen, the Convention would carry out its role 'as a constitutional instrument of European public order'[408] in the area of human rights, and the states would be held responsible under the ECHR.

Given that the ECtHR has not yet shed light on the 'manifest deficiency' concept, its very nature remains opaque.[409] Former judge at the ECtHR, Georg Ress, mentioned in a Concurring Opinion in *Bosphorus* that this presumption could be rebutted when the ECJ either lacked competence or misapplied rights guaranteed under the Convention, or the *locus standi* was interpreted in a very restrictive way.[410] Paul De Hert and Fisnik Korenica have argued that the insufficient protection of fundamental rights in the Community, for instance, in the event the case was not reviewed by judicial mechanisms of the EU might be covered by this concept.[411] This was affirmed by the ECtHR in *Fritz and Nana v France*, in which it emphasised that a refusal to introduce a preliminary ruling might amount to infringement of

403 ibid [111], [165]-[166], [156], [148].
404 ibid [155].
405 ibid [122], [117]; *Van de Hurk v Netherlands* (1994) 18 EHRR 481; *Procola v Luxembourg* (1996) 22 EHRR 193; *Hornsby v Greece* [1997] 24 ECHR 250; Case C-235/99 *R v Secretary of State for the Home Department Ex p. Kondova* [2001] ECR I-6427.
406 *Bosphorus* (n 37), para 155.
407 ibid [156].
408 *Loizidou v Turkey* (preliminary objections) (1995) Series A 310, para 75.
409 Hert and Korenica (n 74) 886; Kuhnert (n 15) 185.
410 *Bosphorus* (n 37), Concurring Opinion of Judge Ress, para 3.
411 Hert and Korenica (n 74) 887.

Article 6 of the Convention. [412]

In light of the lack of the regulation of this issue, it is important to elaborate a more detailed approach specifying the precise conditions for defining the existence of a manifest deficiency. This would also require to tackle the problem of the burden of proof, [413] which was to some extent touched upon in *Klausecker v Germany.*[414]

1.4.3 *Klausecker v Germany*

The case concerned a refusal of the applicant's employment in the European Patent Office (EPO). His appeal to the President of the EPO[415] was rejected pursuant to Articles 106 and 107(1) of the Service Regulations for Permanent Employees of the EPO under which only staff members were granted the right to lodge internal appeals.[416] Given that, under Article 3 of Protocol on Privileges and Immunities of the EPO[417] and Article 8 of the European Patent Convention,[418] the EPO possessed certain privileges needed to perform its functions without any influence on the part of the member states, and thus was immune from the jurisdiction of the German courts.[419] The applicant's direct complaint under Article 19(4) of the Basic Law to the FCC was also dismissed,[420] as no act of public authority, as stipulated in subparagraph 4 Article 93(1) of the Basic Law and Article 90(1) of the Law 'On the FCC', was at issue.

The Administrative Tribunal of the International Law Organisation, [421] the highest jurisdictional organ to resolve disputes between the EPO and its staff members, similarly rejected the appeal because of the lack of competence in respect of individuals who had not

412 *Société Divagsa v Spain* App no 20631/92 (Commission Decision, 12 May 1993) 74 DR 274; *Fritz and Nana v France* App no 15669/89 (Commission Decision, 28 June 1993) 75 DR 39.
413 Tobias Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations Under the European Convention on Human Rights' (2010) 10 HRLR 529, 541.
414 *Klausecker v Germany* App no 415/ 07 (ECtHR, 6 January 2015).
415 ibid [9].
416 EPO, Service Regulations for permanent employees of the European Patent Office, art 107, 106; *Klausecker* (n 351), para 36.
417 Protocol on Privileges and Immunities of the EPO, 5 October 1973, 1065 UNTS 199, art 3.
418 European Patent Convention of 5 October 1973 (the new text of the Convention adopted by the Administrative Council of the EPO by decision of 28.07.2001, OJ EPO 2001, Special edn No 4, 55), art 8.
419 *Klausecker* (n 414), paras 12, 14, 30-31, 54.
420 BVerfG, 2 BvR 2093/05 (22 June 2006) NVwZ 2006, 1403; *Klausecker* (n 414), para 8.
421 Statute of the Administrative Tribunal of the ILO **(**adopted by the International Labour Conference on 9 October 1946, amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992, 16 June 1998 and 11 June 2008), art II para 5.

been recruited.[422] An offer from the EPO to bring the case to arbitration was declined by the applicant, who argued that such a procedure was in breach of the Convention procedural guarantees.[423] He filed a case with the Strasbourg Court against Germany, claiming a violation of Articles 6(1) and 13 of the ECHR, due to the lack of access to domestic courts, and asserting that the EPO legal order did not provide the protection of human rights equivalent to that envisaged by the Convention.[424] The Strasbourg Court, having justified the interference with the right of access to German courts on grounds of public interest, did not find a violation of the applicant's rights under Article 6(1).[425] It held that the offer of arbitration constituted a 'reasonable alternative means' of examination on the merits of the complaint, and did not disclose a 'manifestly deficient protection of fundamental rights within the EPO'.[426] Imposed limitations had been recognised proportionate, and Germany could not be held responsible for these deficient procedures. Thus, the *Klausecker* suggests that the burden of proof in contesting the presumption of equivalent protection lies with the applicant,[427]but the remaining uncertainties as regards the standard of review that will be appled in such cases still have to be addressed by the ECtHR in order to avoid any doubts about the accuracy of its judgments.

1.4.4 Further application of the doctrine in light of the EU accession to the ECHR

Given that the negotiations on accession of the EU to the ECHR are currently suspended, the application of the equivalent protection doctrine might be beneficial for maintaining harmonious cooperation between the two judicial institutions, and for protecting the interests of the state not to have to renounce its obligations stemming from the membership of international organisation to comply with the requirements of the Convention.

In this context, experts took particular interest in whether it would be rational to continue

422 *Klausecker* (n 414), paras 19, 36-38;
423 ibid [23], [26].
424 ibid [58], [41]-[42].
425 ibid [54].
426 ibid [105]-[106].
427 Veronica Bilkova, 'The Standard of Equivalent Protection as a Standard of Review' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standard of Revie and Margin of Appreciation* (OUP 2014) 283.

applying this doctrine after accession of the Union to the Convention.[428] Since DAA did not elaborate on how this problem should be resolved, it has been discussed in the legal literature that the exercise of this doctrine, which might impede the development of the protection of fundamental rights in Europe, should be subsequently abandoned.[429] Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, in their Joint Concurring Opinion in *Bosphorus,* criticised the way the equivalent protection doctrine is being applied, claiming that the ECtHR has 'raised the possibility of inequality between Conracting States' by creating 'different obligations' for the states dividing them into those which had already acceded to it and those who had not.[430] Tobias Lock argued that it would not be fair to exclude EU acts from the scrutiny by the ECtHR as such privileged status would differ from that of EU member states which are already parties to the ECHR.[431]

There is no ground for maintaining this regime, as it might threaten the very aim of the Convention 'to achieve greater unity in the maintenance and further realisation of human rights'.[432] This is particularly significant for individuals as they still lack access to EU judicial institutions and are not allowed to appeal all EU acts to the CJEU. The action for annulment pursuant to Article 263(4) TFEU aims to provide an avenue to bring a case against a regulatory act not entailing implementing measures. If such a measure falls within the competence of EU institutions, the action could be brought against it directly under Article 277 TFEU, and the question of its applicability could be raised before the CJEU. Otherwise, a review of measures adopted by the member states to implement the contested EU legal act should be brought before national courts, which would be expected to refer the issue to the CJEU for a preliminary ruling in accordance with Article 267 TFEU.[433]

Accroding to Advocate General Mengozzi, the preliminary ruling procedure is a means of cooperation between the domestic courts and the CJEU rather than a judicial remedy for the complainants.[434] Francis G Jacobs, former AG of the Court of Justice, has commented that

428 See, eg, Hert and Korenica (n 74), De Schutter (n 74).

429 Xavier Groussot and Eric Stavefeldt, 'Accession of the EU to the ECHR: A Legally Complex Situation' in Joakim Nergelius and Eleonor Kristoffersson (eds), *Human Rights in Contemporary European Law* (Hart Publishing 2015) 17; *Bosphorus* (n 37), Concurring Opinion of Judge Ress, para 1.

430 ibid, Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, para 4.

431 Lock (n 71) 395.

432 ECHR (n 7), Preamble.

433 Case C-274/12 *Telefonica SA v European Commission* [2013] OJ C52/12, para 29; Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] ECRI-0000, para 93; Case 294/83 *Parti Ecologiste "Les Verts" v European Parliament* [1986] ECR 1339, para 23.

434 Case C-354/04 *Gestoras Pro Amnistía, Juan Mari Olano Olano and Julen Zelarain Errasti v Council of*

even if the preliminary ruling procedure contributed to the uniform interpretation of Community law and assisted in further integration of EC legislation into the legal orders of the member states, it did not facilitate access of individuals to justice in the EU[435] as the submission of a request to the CJEU for a preliminary ruling falls within the discretionary competence of national courts. This is why neither the possibility of a direct review of the legality of EU acts, nor indirect review by means of the preliminary ruling procedure, which is not available to individuals, might strengthen their position before the CJEU.

If the equivalent protection doctrine is set aside, the Strasbourg Court would then be granted a right to challenge the supremacy of EU law.[436] Paul de Hert and Fisnik Korenica believe that the autonomy of EU law would be preserved if this doctrine continues to be applied,[437] and that the *Matthews* approach, as proposed by Paul Gragl, which called for responsibility of member states for violations of EU primary law, remains intact.[438] Given that such cases would require the Strasbourg Court to determine whether the violation resulted from primary or secondary law, it would be involved in the process of examining the distribution of powers between the EU and its member states, which might encroach on the autonomy of the Union's legal order.[439] It seems therefore prudent that for the purpose of maintaining a stable coexistence between the CJEU and the ECtHR[440] and assuring individuals the most comprehensive protection of their rights in the European legal arena, further application of the equivalent protection doctrine is abandoned. It still remains to be seen, however, which consequences the anticipated accession of the EU to the ECHR can entail for the relationship between these courts, and how the *Bosphorus* doctrine will eventually be accommodated.

1.5 Chapter summary

This chapter demonstrated how the supranational and national courts have managed to build a cooperative relationship to avoid potential jurisdictional clashes. The long history of collaboration between the courts of the member states and the CJEU originated in the

the European Union [2007] ECR I-1579 and Case C-355/04 *Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council of the European Union* [2007] ECR I-06157, Opinion of AG Mengozzi delivered on 26 October 2006, para 95.

435 Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR 2002 I-6677, Opinion of AG Jacobs delivered on 21 March 2002, paras 36-49.

436 Hert and Korenica (n 74) 892.

437 ibid 893.

438 Gragl (n 73) 125, 126.

439 ibid 114.

440 De Schutter (n 74) 32.

persistent efforts of the latter to preserve the supremacy of Community law against constant attempts by states to challenge it, and has affected the practice of the Court of Justice to the extent that over time it has elaborated its own body of case law on fundamental rights, and has been thus recognised as lawful in the protection of individuals at the Community level.

The analysis of the relationship between the courts of the member states and the CJEU shows the existence of a longstanding problem of determining the constitutional limits to European integration. Member states have reserved the right to supervise the constitutionality of EU legislation by invoking various domestic review mechanisms, including fundamental rights reviews, *ultra vires* reviews, and constitutional identity reviews. These were elaborated in the jurisprudence of the FCC, which observing that Community law did not provide efficient protection of fundamental rights, established in *Solange I* its authority to review EU secondary law and to declare any EU act that was found to be incompatible with fundamental rights under the Basic Law inapplicable in the national legal system. Having constrained itself in exercising this power in *Solange II*, the FCC affirmed that the level of the fundamental rights protection in the Community was equal to that granted under the Basic Law, but nevertheless continued to control the limits of transferred sovereign powers to the EU through *ultra vires* review, as defined in *Maastricht,* and constitutional identity review, as outlined in *Lisbon*, to safeguard the constitutional principles of the state.

Clearly, the idea of providing strong protection of fundamental rights in the German legal order and securing the constitutional identity of the state against the increasing power of the EU was proved to be central in the FCC's jurisprudence.[441] The FCC, in resolving contradictions between EU law and the national constitutional law in favour of the latter, will always strive to preserve its role as a significant actor in controlling the process of Germany's participation in the European legal space.

As the legal systems of both the EU and its member states are interconnected, and their respective judicial institutions have supreme power within their own sphere of influence, the underlying principle of their relationship is not in establishing 'subordination but about appropriately sharing and assigning responsibilities in a complex multilevel system'.[442] Given

441 Payandeh (n 62) 33.

442 Ferdinand Kirchhof, 'Die Kooperation zwischen Bundesverfassungsgericht und Europäischem Gerichtshof' [The Cooperation between the FCC and the ECJ] in M Herdegen and others (eds), *Staatsrecht und Politik: Festschrift für Roman Herzog zum 75. Geburtstag* (Verlag CH Beck 2009) 155 cited in Voβkuhle (n 10) 189.

that this is of practical importance to harmonising judicial cooperation, the CJEU would be expected to be more attentive to those solutions adopted at the national level by revising its own position when required to achieve better compliance by national authorities with EU law. In the same vein, the courts of the member states that have reserved the right to review EU law should limit the exercise of that power so as not to undermine the unity of the EU legal system and the credibility of the CJEU.

The chapter highlighted that such extended competence of the CJEU to deal with cases concerning fundamental rights may increase a risk of jurisdictional tensions with the Strasbourg Court. It has been discussed that accession of the EU to the Convention will contribute significantly to alignment of judicial practices of the courts and ensure coherence in their actions. Possible ways of addressing concerns expressed by the Court of Justice in Opinion 2/13 were suggested in order to proceed with accession negotiations. The chapter evaluated potential changes that might occur in the relationship between the CJEU and the ECtHR in the event EU accedes to the ECHR and examined the legitimacy of the use of the doctrine of equivalent protection in the jurisprudence of the ECtHR. It has been argued that to contribute to maintaining a stable cooperation between the two regimes and strengthen the protection of fundamental rights in the EU it would not be rational after EU's accession to the Convention to continue adhering to Bosphorus approach that is currently applied in respect of the EU.

CHAPTER II

INTERACTION BETWEEN THE ECTHR AND NATIONAL COURTS

2.1 Introduction

This chapter addresses challenges in the relationship between the Strasbourg Court and the courts of the ECHR contracting parties. It seeks to determine the rank of the Convention and the status of judgments of the ECtHR in the hierarchy of legal sources of the ECHR member states and evaluate the role of domestic authorities in Germany and Russia in implementing the ECtHR's judgments and in harmonising the national legislation and judicial practices in accordance with the Convention standards.

The chapter explores the extent to which member states adhere to their obligations under the ECHR and scrutinises how they settle tensions that emerge between the Convention and national constitutional law. It first provides an analysis of the effect of the ECtHR's judgments in the German legal system, and shows how the FCC approaches the resolution of jurisdictional conflicts. It then describes how a balance of powers between the Strasbourg Court and the Russian Constitutional Court (RCC) has been struck, taking into account recent legislative changes and developments in the jurisprudence of the RCC, which has acquired a power to rule on the enforceability of ECtHR's judgments. The chapter outilnes the extent to which the judgments of the Strasbourg Court that contradict the fundamental principles of the state's legal order could be executed in the national legal system. Suggestions are made to avoid clashes between the ECtHR and national judiciaries, and improve their cooperation for the most effective implementation of the ECHR in member states.

Finally, the chapter examines the challenges in applying the margin of appreciation doctrine in the jurisprudence of the Strasbourg Court, reflects on concerns over the legitimacy of the European consensus concept, and proposes how to remove uncertainties in the use of these judicial instruments in the ECtHR's practice.

2.2 Implementation of the Strasbourg Court's judgments in Germany

The principle of openness towards international law [443] which, according to Andreas Voβkuhle, combines 'the exercise of state sovereignty with the idea of international cooperation', [444] seeks to facilitate the integration of Germany in the international community.[445] However, this approach was not effective enough, as the transfer of decision-making powers to international organisation was circumscribed by the requirements of the Basic Law, and subject to the oversight of the FCC.[446]

The incorporation of the ECHR into the German legal system was carried out in accordance with Article 59(2) of the Basic Law which reads:

> 'Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law'.

Since 1952, when Germany ratified the ECHR,[447] it has obtained a status of non-constitutional federal law[448] in the national legal system. As soon as the right of the individual petition under the Convention's mechanism was recognised,[449] complaints were submitted first to the FCC (thus exhausting domestic remedy as required under Article 35(1) of the Convention), and then to the European Commission and the ECtHR itself.[450] Given that the Basic Law's openness to international integration was limited to functions of constitutional law,[451] the jurisdictional tensions between the Strasbourg Court and the FCC which were conceived as

443 Basic Law (n 97), Preamble: 'to promote world peace as an equal partner in a united Europe'; BVerfGE 111, 307, 2 BvR 1481/04 (14 October 2004) NJW 2004, 3407 (3409), para 33 *Völkerrechtsfreundlichkeit*.

444 Voβkuhle (n 10) 185.

445 Carl Lebeck, 'National Constitutionalism, Openness to International Law and the Pragmatic Limits of European Integration — European Law in the German Constitutional Court from EEC to the PJCC' (2006) 7(11) German LJ 907, 908.

446 ibid 937.

447 Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten [Act on the Convention for the Protection of Human Rights and Fundamental Freedoms (Act of Approval)] 7 August 1952 BGBl II, 685.

448 Papier (n 67) 1.

449 Christoph Gusy and Sebastian Müller, 'State of the Art Report Germany. Strasbourg Court Jurisprudence and Human Rights in Germany: An Overview of Litigation, Implementation and Domestic Reform' (Juristas 2007) 6.

450 Tomuschat (n 88) 514; *Herz v Germany* App no 44672/98 (ECtHR, 12 June 2003) NJW 2004, 2209.

451 Lebeck (n 445) 908; Frank Schorkopf and Christian Walter, 'Elements of Constitutionalisation: Multilevel Structures of Human Rights Protection in General International Law and WTO-Law' in Russell A Miller and Peer C Zumbansen (eds), *Comparative Law as Transnational Law: A Decade of the German Law Journal* (OUP 2012)106.

'comparable institutions of jurisdiction as regards their functions, which adjudicate according to closely related catalogues of fundamental rights' were inevitable, due to the existence of such parallel competence.[452]

2.2.1 *Von Hannover v Germany*

Although the number of adverse judgments from the Strasbourg Court in respect of Germany is relatively low,[453] it has come into conflict with the FCC. The case at hand, *Von Hannover v Germany*, a series of cases which dealt with the protection of the privacy of public figures, illustrated how the FCC and the ECtHR clashed in balancing the positive obligation to secure the right to privacy as guaranteed under Article 8 of the Convention against a negative obligation not to infringe freedom of expression as stipulated in Article 10.

Princess Caroline, the eldest daughter of Prince Rainier III of Monaco, made unsuccessful attempts in the national courts to obtain an injunction prohibiting publication of photographs disclosing the details of her private life.[454] She appealed to the FCC, claiming that publication was a breach of the right to free development of her personality enshrined in Articles 1(1) and 2(1) of the Basic Law.[455] The FCC, paying particular attention to the public's interest in the Princess's behaviour that went beyond her representative functions, allowed the appeal in so far as it concerned the right to family protection, as guaranteed in Article 6 of the Basic Law.[456]

In 2004, the applicant appealed to the ECtHR alleging a violation of the Convention rights under Article 8.[457] The German government argued that the domestic courts, in defending the interest of the nation in knowing details of Princess's private life because of her influence on society, attempted to ensure balance between the applicant's right to a private life and freedom of the press.[458] The Strasbourg Court in weighing these conflicting rights came, however, to a different conclusion. Having invoked its responsibility to provide protection of private life from the view of the development of one's personality, the Court criticised the position of the

452 Voβkuhle (n 10) 185.
453 Statistics (n 48).
454 *Von Hannover* (n 38), paras 18-36.
455 ibid [24]-[25].
456 BverfGE 101, 361, 1 BvR 653/96 (15 December 1999) NJW 2000, 1021.
457 *Von Hannover* (n 38), paras 37-38; BVerfG, 1 BvR 1505/99 (4 April 2000) NJW 2000, 2189; BVerfG, 1 BvR 2080/98 (13 April 2000) NJW 2000, 2192.
458 *Von Hannover* (n 38), para 45.

German courts, stressing that insufficient respect has been paid to the reputation and private lives of others.[459] It held that there was neither contribution to public debate as no official functions were exercised, nor public's legitimate interest in being informed of the applicant's daily routine.[460] The Court recognised that there had been a violation of Article 8 of the Convention as the German courts had not managed to balance these rights within the limits of the margin granted to the state.[461]

Despite relying on the Strasbourg Court's judgment before the German courts, the applicant's later attempts to restrain publication of photographs were refused[462] as the national authorities experienced difficulties in executing the ECtHR's judgment.[463] Therefore, the case was taken repeatedly in 2012 to the ECtHR due to the publication of photographs of the applicant's skiing holiday accompanied by an article on the poor health of her father.[464] The Strasbourg Court has observed that the national courts, in following the provisions of the Convention, the previous judgment of the ECtHR, and its relevant case law when determining whether the photos and article contributed to a debate of general interest, had made changes to their judicial practices to balance the competing rights of the applicant's right to privacy and the publishing company's freedom of expression.[465] Having confirmed the legitimacy of public's interest in knowing about the health status of the Prince Ranier of Monaco and his family's reaction to that, the Court held in *Von Hannover v Germany (no 2)* that the national authorities had complied with their positive obligations under Article 8 of the Convention.[466] However, even if the German courts altered their position when reconciling these conflicting values, they still lacked the ability to provide adequate procedural protection for the applicants' interests.[467]

Princess Caroline returned to the Strasbourg Court in 2013, following the publication of more holiday photos.[468] Reaffirming the positive shifts in the jurisprudence of the German courts in finding an equilibrium between the rights in Articles 8 and 10 of the Convention, the ECtHR

459 ibid [58], [69], [72].
460 ibid [76]-[77].
461 ibid [79]-[80].
462 *Von Hannover v Germany (no 2)* [2012] ECHR 228, para 74.
463 Angelika Nussberger, 'Subsidiarity in the Control of Decision Based on Proportionality: An Analysis of the Basis of the Implementation of ECtHR Judgments into German Law' in Anja Seibert-Fohr and Mark E. Villiger (eds), *Judgments of the European Court of Human Rights – Effects and Implementation* (Nomos 2014) 178.
464 *Von Hannover (no 2)* (n 462), para 75.
465 ibid [124]-[125].
466 ibid [125]-[126].
467 ibid [84].
468 *Von Hannover v Germany (no 3)* [2013] ECHR 835.

upheld the Government's position that there was no connection between those photos and the article that accompanied them which could contribute to a debate of general interest, and acknowledged that the state, in giving due weight to the principle of proportionality, had managed to operate within the scope of the margin of appreciation granted to it.[469]

Taking into account that these rights deserve equal respect,[470] it still remains problematic in practice to achieve the right balance 'between the competing interests of the individual and of the community as a whole'.[471] Given the fact that the two courts are applying divergent methodological approaches in evaluating the conflicting interests, this might give rise to further inconsistencies in their judicial practices. Therefore, to prevent possible contradictions between the Strasbourg Court and the domestic courts which may compromise legal certainty,[472] the ECtHR would be expected to leave broad discretion to member states to tackle such disputes, and the national courts would be required to attach more attention in their jurisprudence to Convention standards and the case law of the Strasbourg Court.

2.2.2 *Görgülü* case and its effect in the domestic legal order

Following a series of cases in *Von Hannover v Germany* the FCC acknowledged the necessity to determine the legal status of the ECHR and of the judgments of the Strasbourg Court in the German legal system. The FCC's *Görgülü* case of 14 October 2004 was seen as a response to the Strasbourg Court's first judgment in *Von Hannover v Germany* of 24 June 2004 that challenged the decision of the FCC of 13 April 2000[473] and had an immense practical significance as it shed light on the nature of the obligations of Germany arising from the participation in this international treaty.[474]

The case concerned the custody of a child born out of wedlock. The applicant was denied the right to visit his child, who had been placed with a foster family,[475] and his appeals lodged with the German courts had failed.[476] In view of the FCC's refusal on 31 July 2001 to

469 ibid [38], [58].
470 *Von Hannover (no 2)* (n 462), para 106.
471 *Aksu v Turkey* App no 4149/04 and 4102904 (GC, 7 February 2012), para 62.
472 Nussberger (n 463) 185.
473 BVerfG, 1 BvR 2080/98 13 April 2000; *Von Hannover* (n 38), para 38.
474 Felix Müller and Tobias Richter, 'Report on the Bunderverfassungsgericht's (Federal Constitutional Court) Jurisprudence in 2005/ 2006' (2008) 9(2) German LJ 161, 162.
475 *Görgülü* (n 39), para 33.
476 ibid [17]-[28].

examine his constitutional complaint,[477] Görgülü took the case to the ECtHR, which, having recognised a violation of the Convention right to private and family life stipulated in Article 8, eventually ruled in his favour on 26 May 2004.[478]

In balancing the competing interests of the applicant and the rights of the child and foster family, the Strasbourg Court drew attention to the need to maintain the bond between a natural parent and their child, which could not be achieved if they were not permitted to see each other or only on a rare basis that would not assist in establishing the familial relationship between them.[479] The Court held that the decision of the Naumburg Court of Appeal rejecting the applicant's request for custody and suspending access to the child for one year was disproportionate to the legitimate aim pursued, and thus represented a serious interference with the right to a family life.[480] Under Article 46 of the Convention, Germany was required to make redress and at least grant the applicant access to the child.[481]

Having stressed that the Strasbourg Court's judgments have limited effect and are binding on Germany only as a subject of public international law, but not the domestic courts which are independent under Article 97(1) of the Basic Law, the Naumburg Higher Regional Court by Order of 30 March 2004[482] suspended the temporary injunction on access rights issued by the Wittenberg Local Court on 19 March, and later cancelled this injunction as it lacked a legal basis under procedural law.[483]

The complainant's constitutional appeal challenging this Order and requesting a temporary injunction on access to the child was allowed. The FCC held that the ECHR and the case law of the ECtHR served as 'guides to interpretation in determining the content and scope of the fundamental rights and constitutional principles of the Basic Law' and should be taken into account by all state bodies in Germany, as long as they did not diminish the protection of the rights of individuals under the German Constitution.[484] It was emphasised that such an obligation would require the courts to 'take notice' or 'at least duly consider' the Convention's guarantees and their interpretation by the Strasbourg Court when deciding a case if it does not

477 BVerfG, 1 BvR 1174/01 (31 July 2001) cited in BVerfGE 111, 307 (n 443); *Görgülü* (n 39), para 28.
478 *Görgülü* (n 39), para 47.
479 ibid [45], [46].
480 ibid [27], [50].
481 ibid [64].
482 OLG Naumburg (30 June 2004) 14 WF, 64/04 FamRZ 1510-1512.
483 BVerfGE 111, 307 (n 443), paras 13-18.
484 ibid [29], [30], [32]; ECHR (n 7), art 53.

infringe constitutional law.[485] The FCC justified this approach by reference to the status of the ECHR within the hierarchy of legal acts which, like other federal statutes, should be applied by the German courts in the interpretation of national legislation, including the fundamental rights and constitutional guarantees.[486] This is equally important to avoiding any conflict with Germany's obligations under international law and in complying with the provisions of Article 20(3) of Basic Law requiring judges to abide by the law in rendering decisions.[487]

The FCC stressed that, although those guarantees under the Convention and its Protocols do not represent a 'direct constitutional standard of review',[488] Articles 1(2) and 59(2) of the Basic Law constitute a basis for ensuring compliance with international obligations by Germany, especially those resulting from the ECHR, and for examining any allegations that national authorities either disregarded or did not take into consideration a decision of the Strasbourg Court when interpreting the fundamental rights enshrined in the Basic Law.[489] According to Christian Djeffal, this could make the ECHR 'quasi constitutional'.[490]

Having found a violation of the constitutional right to respect for family life under Article 6 of the Basic Law, the FCC revoked the decision of the Naumburg Higher Regional Court as it had failed to give due weight to the interpretation of the ECHR made by the ECtHR on 26 February 2004.[491] This unprecedented case had an enormous impact on the national legal order, as it reinforced the supervisory function of the FCC in its oversight of the application of the Convention (and its interpretation by the Strasbourg Court) by national courts. In so doing, it sought to prevent any liability of the state under international law,[492] but clarified that such a relationship between international and domestic law that represents 'two different legal spheres' is subject to regulation only by domestic law pursuant to Articles 25 and 59(2) of the Basic Law,[493] and in the event of collision the German courts would have to apply the Basic Law.

Given that this might hinder further implementation of the ECtHR's judgments in the German

485 BVerfGE 111, 307 (n 443), para 62.
486 ibid [30]-[31], [53].
487 ibid [33].
488 ibid [32]; see Basic Law (n 97), art 93.1 sec 4.a; BVerfGG (n 124), art 90.1.
489 BVerfGE 111, 307 (n 443), paras 62, 63.
490 Christian Djeffal, 'Dynamic and Evolutive Interpretation of the ECHR by Domestic Courts? An Inquiry into the Judicial Architecture of Europe' in Georg Nolte and Helmut Philipp Aust (eds), *Interpretation of International Law by Domestic Courts-Uniformity, Diversity, Convergence* (OUP 2016) 179.
491 BVerfGE 111, 307 (n 443), paras 28, 29, 64.
492 ibid [61].
493 ibid [34].

legal system,[494] new tensions between the courts could arise, particularly, as discussed earlier, in multipolar cases in which the rights of individuals are connected in a contradictory way. When balancing such conflicts of interest in family law, the law concerning aliens, and the law on the protection of personality,[495] the Strasbourg Court would seek to reconcile their positions, which is, however, not its principal task, as it is mainly engaged in resolving disputes between the applicant and the state. In these cases it would be difficult to avoid contradictions between the ECHR and the domestic law because the ECtHR's extensive interpretation of the rights of one party might cause a significant restriction of the rights of another under constitutional law, or might contradict the provisions of the Constitution.[496]

The FCC has emphasised in *Görgülu* that in cases where the original proceedings were in civil law, which may not completely reflect the legal interests involved, the domestic courts should determine the extent to which the ECtHR's judgments will be taken into account, and if they 'do not follow the international – law interpretation of the law', would have to justify it in an understandable manner.[497] Jens Meyer Ladewig has expressed doubts as to whether having the opportunity to depart from accepted international obligations would correspond with the Convention requirement of Article 46(1), under which the contracting parties to the Convention are bound by the judgments of the ECtHR.[498] The FCC clarified that there was:

> 'no contradiction with the aim of commitment to international law, if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted'.[499]

This position of the Court has been criticised by the former President of the ECtHR, Luzius Wildhaber, who expressed his hope for a more 'European sense of responsibility' from Germany.[500] Given that it is important to continue contributing to the development of effective protection of fundamental rights in Europe judgments of the Strasbourg Court would not be disregarded by national authorities without 'good reason',[501] and even if a control over their

494 Frank Hoffmeister, 'Germany: Status of European Convention on Human Rights in Domestic Law' (2006) 4(4) Intl J Const L 722, 730.
495 BVerfGE 111, 307 (n 443), para 58.
496 Gertrude Lübbe-Wolff, 'ECtHR and National Jurisdiction – The Görgülü case' (2006) HFR 12, para 7.
497 BVerfGE 111, 307 (n 443), paras 59, 50.
498 Meyer-Ladewig (n 88) 224.
499 BVerfGE 111, 307 (n 443), para 35.
500 Luzius Wildhaber, 'Das Tut Mir Weh' [That Hurts Me] *Der Spiegel* 47/2004 (15 November 2004) 50 <http://www.spiegel.de/spiegel/print/d-36625709.html> accessed 15 September 2015.
501 Dean Spielmann, 'Jurisprudence of the European Court of Human Rights and the Constitutional Systems of

enforcement was reserved,[502] the FCC confirmed its willingness to 'help the ECtHR with implementing its decisions'.[503] Hans-Jürgen Papier, former President of the FCC, described this relationship between the courts as cooperative in 'carrying out similar tasks of protection of human and basic rights'.[504]

It is thus clear that in those legal systems where the boundaries between national and international legal orders are explicitly delineated, and international law is subordinate to the Constitution, further collisions are inevitable. André Nollkaemper argued that even if international law is domesticated and forms a part of the national legal order, the institutions applying it are guided by national rather than international law.[505] Former judge of the FCC, Gertrude Lübbe-Wolff, has opined that it would be difficult in such cases to meet the requirements of both international and national law, and the national court runs the risk of violating the international treaty by giving precedence to the constitutional guarantees at the cost of deviating from accepted under the ECHR obligations.[506] It is therefore significant to ensure that national authorities interpret the provisions of national legislation found by the ECtHR to be incompatible with the Convention either in a way which is compatible, or amend it in line with the ECHR requirements.[507] Jens Meyer - Ladewig expressed confidence that all German legislation, including the Basic Law, respected the Convention and its interpretation by the Strasbourg Court.[508]

Needless to say that the ECHR and the case law of the ECtHR have always had a great effect in the German legal system as public authorities have consistently demonstrated their eagerness to adapt national legislation and legal practices to the Convention standards.[509] For instance, following *Elsholz v Germany*,[510] Germany passed the Law on Family Matters of 16

Europe' in Michel Rosenfeld, András Sajó (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 1250.

502 Niels Petersen, 'The Reception of International Law by Constitutional Courts through the Prism of Legitimacy' (2009) 39 Preprints of the Max Planck Institute for Research on Collective Goods 1, 26 -27.

503 Matthias Hartwig, 'Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights' (2005) 6(5) German LJ 869, 894.

504 Hans-Jürgen Papier, 'Strassburg ist Kein Oberstes Rechtsmittelgericht' [Strasbourg is Not a High Court of Appeal], *Frankfurter Allgemeine Zeitung* (9 December 2004) 5: 'Es geht auch-und vielleicht in erster Linie-um eine Kooperation bei der Warnehmung gleichgerichteter Aufgaben der Schutzes von Grund- und Menschenrechten'(in translation by Frank Hoffmeister (n 544) 730.

505 André Nollkaemper, 'Grounds for the Application of International Rules of Interpretation in National Courts' in Aust P H and Nolte G (eds) (n 63) 44.

506 Lübbe -Wolff (n 496), para 11.

507 ibid [51].

508 Meyer-Ladewig (n 88) 223.

509 Herbert Küpper, 'The Decisions of the European Court of Human Rights and their Implementation in Germany' (2011) 5(2) ICLJ 200, 201, 206.

510 *Elsholz v Germany* (2000) 34 EHRR 58, para 66.

December 1997[511] that introduced changes to legal regulation of child custody. Amended provisions of Articles 1626 and 1684 of the German Civil Code[512] were later challenged in *Görgülü*. It is also important to note that the Code of Criminal Procedure[513] and the Code of Civil Procedure[514] recognise the judgments of the ECtHR finding a violation of the ECHR as a ground for reopening domestic proceedings.

As a contracting party to the Convention for more than 60 years, Germany has performed its duties under the treaty in a most diligent and efficient way.[515] In attaching due weight to its Convention obligations, it has timely implemented adverse judgments of the ECtHR, amending national legislation and ensuring adherence of domestic courts to their responsibility to review cases in accordance with the decisions of the ECtHR.[516] In light of this accumulated positive experience of Germany in enforcing judgments of the Strasbourg Court, other relatively new contracting parties to the Convention such as the Russian Federation, which still need to create an internationally positive image in complying with the Convention obligations, may be able to benefit from it.

2.3 Conflicts between the ECtHR and the Russian Constitutional Court

2.3.1 The status of the ECHR in the Russian legal system

Accession of the Russian Federation to the CoE was challenging and took several years due to grave human rights violations, notably 'indiscriminate and disproportionate use of force by the Russian military [...] against the civilian population' in Chechnya.[517] Having encouraged the state to resolve the Chechnya conflict first, the Parliamentary Assembly of the CoE (PACE) decided to suspend the consideration of Russia's request to become a member state of

511 Gesetz zur Reform des Kindschaftsrechts [Law on Family Matters] 16 December 1997, BGBl I, 2942.
512 Bürgerliches Gesetzbuch (BGB) (in version promulgated on 2 January 2002) BGBl I, 42, 2909; 2003 BGBl I, 738, last amended by art 4 para 5 of the Act of 1 October 2013 BGBl I, 3719.
513 Gesetz zur Reform des strafrechtlichen Wiederaufnahmerechts [Act on the Reform of the Reopening of Proceedings under Criminal Law] 9 July 1998, BGBl I, 1802, para 359 No 6 StPO.
514 ZPO [Code of Civil Procedure] 5 December 2005, BGBl I, 3786, para 580 No 8 as amended 22 December 2006 BGBl I, 3416.
515 Statistics (n 48).
516 BVerfGE 111, 307 (n 443), para 55.
517 PACE, Resolution on Russia's request for membership in the light of the situation in Chechnya, Res 1055 (1995), 2 February 1995, para 2.

the Council.[518]

To meet the necessary conditions for membership, Russia was required to undertake several measures, including introducing new laws in accordance with the CoE standards, bringing those accused of human rights violations to justice, reviewing the detention conditions.[519] Almost three years after the application was submitted, PACE, noting the efforts by Russia to end the Chechnya conflict, to be integrated into international and European organisations, to respect the rule of law, and to improve the legislative basis for the protection of human rights, reopened the procedure.[520] By accentuating the importance of these positive developments, PACE expressed a strong belief that Russia would be able to meet the conditions established by Articles 3 and 4 of the Statute of the Council, and on 14 February 1996 the state was invited to become the 39th member of the CoE.[521]

The Russian Federation acceded to the CoE on 28 February 1996, ratified the ECHR on 5 May 1998 and accepted the compulsory jurisdiction of the ECtHR concerning the questions of interpretation and application of the Convention and its Protocols.[522] It was obvious, however, in the case of Russia that the 'isolationist tendency of Soviet society in general and of the Soviet legal system in particular' continued to dominate,[523] which is why full compliance with international human rights standards was still deficient. The primacy of international law over national law was established by Article 129 of the Basic Principles of Civil Law of the Soviet Union and the Republics of 1961.[524] During the *perestroika*[525] (restructuring) period, the Government of Mikhail Gorbachev expressed the intention to bring national legislation in line with the requirements of international law.[526] In the letter of 28 February 1989 to the UN Secretary-General, former Minister of Foreign Affairs of the Soviet

518 ibid [11].
519 Muehlemann, Report on Russia's Request for Membership in the Light of the Situation in Chechnya (Doc 7230, 30 January 1995), para 16.
520 PACE, Procedure for an opinion on Russia's request for membership of the Council of Europe, Res 1065 (1995) 26 September 1995; Muehlemann, Report on procedure for an opinion on Russia's request for membership for the Council of Europe (Doc. 7372, 11 September 1995).
521 CM, Invitation to the Russian Federation to become a member of the Council of Europe, Res (96) 2, 14 February 1996; PACE, Opinion No 193 on application by Russia for membership of the Council of Europe, 25 January 1996, para 7.
522 Federal Law of the Russian Federation N54-FZ 'O Ratifikacii Konvencii o Zawite Prav Cheloveka y Osnovnih Svobod y Protokolov k Nei' [On the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols] 30 March 1998 // RG N67, 7 April 1998, art 1.
523 Gennady M Danilenko, 'The New Russian Constitution and International Law' (1994) 88 AJIL 451, 458.
524 Zakon SSSR ob Utverzhdenii Osnov Grazhdanskogo Sudoproizvodstva Soyuza SSR y Soyuznih Respublik 8 December 1961 // Bull of the USSR Supreme Soviet N50, St 526.
525 Kristen Renwick Monroe, *Perestroika!: The Raucous Rebellion in Political Science* (Yale UP 2005) 4.
526 Mikhail Gorbachev, *The Reality and Guarantees of a Secure World* (Pravda 1987) 13.

Union, Eduard Shevardnadse, has underlined that the Union strived to strengthen international legal order by ensuring that international law and the obligations of the state take precedence over their internal regulations.[527]

The principle of direct effect of international law envisaged in Article 1(2) of the Declaration of the Rights and Freedoms of Man and of the Citizen of 1991[528] was inserted into Article 32 of the Constitution of the Russian Soviet Federative Socialist Republic of 12 April 1978[529] by means of the Law of the Russian Federation N2708-I of 1992.[530] In the wake of subsequent constitutional reforms in the 1990s, 'a new openness in the field of international relations' was observed.[531] This was later reflected in Article 15(4) of the Russian Constitution of 1993, which reads:

> 'The commonly recognised principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation determines other rules than those stipulated by the law, the rules of international treaty shall apply'.[532]

Despite such a friendly approach to international law, the exact legal status of the ECHR in the hierarchy of sources of law in the Russian legal system has not been defined. Within the meaning of Article 15(1) of the Constitution, which recognised that:

> '[l]aws and other legal acts adopted by the Russian Federation may not contravene the Constitution of the Russian Federation that has supreme legal force, direct effect, and shall be applicable throughout the entire territory of the Russian Federation',

the ECHR would presumably rank below the Constitution if the term 'other legal acts' is

527 V Verewetin, G Danilenko and R Myullerson, 'Konstitutzionnaya Reforma v SSSR y Mezhdunarodnoe Pravo' [Constitutional Reform in the Soviet Union and International Law] (1990) 5 State and Law cited Burkov (n 89) 38.

528 Deklaraciya Prav y Svobod Cheloveka y Grazhdanina N1920-1 [Declaration of the Rights and Freedoms of Man and of the Citizen] 22 November 1991 // Bull RSFSR Supreme Soviet N52, St 1865.

529 Konstitutziya Rossiskoi Sovetskoi Federativnoi Socialisticheskoi Respubliki [Constitution of the Russian Soviet Federative Socialist Republic] 12 April 1978 [(adopted by the RSFSR Supreme Soviet 12 April 1978) // Vedomosti VS RSFSR N 15, St 407; (unlike the Constitution of the Soviet Union of 7 October 1977 that did not have any similar provisions) // Bull VS USSR N 41, St 617.

530 Law of the Russian Federation N2708-I 'Ob Izmeneniyah y Dopolneniyah Konstitucii (Osnovnogo Zakona) Rossiskoi Sovetskoi Federativnoi Socialisticheskoi Respubliki' [On Amendments and Additions to the Constitution of RSFSR] 21 April 1992 // RG N 111, 16 May 1992.

531 Angelika Nussberger, 'The Reception Process in Russia and Ukraine' in Sweet and Keller (eds), *A Europe of Rights* (n 85) 615.

532 Konstitutziya Rossiskoi Federatzii [Russian Constitution] 12 December 1993) // RG N 237, 25 December 1993.

interpreted as including international treaties ratified by the state.[533] Valery Zorkin, Chairman of the Russian Constitutional Court (RCC), argued that, under Article 15(4), the ECHR constituted an integral part of its legal system, but the supremacy of international treaties would not cover the Constitution itself as exclusive power to interpret it was vested in the RCC. [534] Given that the Strasbourg Court's interpretation of the Convention could not supplant the RCC,[535] the legal status of the ECHR might be determined as having a priority over ordinary laws unless there was conflict with the Constitution.[536]

Not only is the legal status of the Convention in the legal system of the Russian Federation ambiguous, but the legal nature of the judgments of the ECtHR might also be uncertain. In Resolution N4-P of 2 February 1996, the RCC clarified that, in light of the constitutional right to apply to international judicial bodies under Article 46(3) of the Constitution, the decisions of international bodies might lead to a review of cases that had been held to be in violation of international law.[537] This would mean that not only international treaties, but also decisions of international bodies were recognised as an integral part of the Russian legal system. Gennady Danilenko commented that the RCC had created by means of this Resolution an obligation to give direct effect in the national legal system to the decisions of international bodies, including those of the ECtHR.[538]

In Resolution N1-P of 25 January 2001, the RCC declared that, having recognised the jurisdiction of the Strasbourg Court, the Russian Federation has pledged itself to bring its

533 Gennady M Danilenko, 'Primenenie Mezhdunarodnogo Prava vo Vnutrennei Pravovoi Sisteme Rossii: Praktika Konstitutzionnogo Suda' [Application of the International Law In the National Legal System of Russia: Practice of the Constitutional Court] (1995)11 State and Law 115, 116.

534 Valery Zorkin, 'Predel Ustupchivosti' [The Limits of Compromise] *RG* N5325 (246) (Moscow, 29 October 2010) <http://www.rg.ru/2010/10/29/zorkin.html> accessed 27 August 2015.

535 ibid.

536 Maxim Ferschtman, 'Russia' in Robert Blackburn and Jörg Polakiewicz (eds), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (OUP 2001) 736; Maxim Ferschtman, 'Reopening of Judicial Procedures in Russia: The Way to Implement the Future Decisions of ECHR Supervisory Organs?' in Thomas Barkhuysen and others (eds), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (Martinus Nijhoff Publishers 1999) 127.

537 RCC, Resolution N4-P of 2 February 1996 'Po delu o proverke konstitucionnosti punkta 5 chasti vtoroi statyi 371, chasti tretjei statyi 374 y punkta 4 chasti vtoroi statyi 384 Ugolovno-processualnogo Kodeksa RSFSR v vvyazi s zhalobami grazhdan K M Kulneva, V S Lalueva, I V Lukashova, I P Serebrennikova' [On verification of constitutionality of provisions of para 5 of part two of art 371, the third part of art 374 and para 4 of part two of art 384 of the Criminal Procedure Code of the Russian Federation in connection with the complaints of citizens K M Kulneva, V S Lalueva, and I V Lukashova, I P Serebrennikov] // Bull RCC 1996, N2, para 7 subpara 2.

538 Gennady Danilenko, 'Implementation of International Law in CIS States: Theory and Practice' (1999) 10 EJIL 51, 53.

judicial practice in line with the requirements of the ECHR and its Protocols.[539] In Ruling N12 of 10 October 2003, the Plenum of the Supreme Court of the Russian Federation stated that the judgments of the Strasbourg Court in respect of Russia were binding on national authorities, particularly the domestic courts.[540] The Supreme Court instructed the lower courts to take into account any judgments of the ECtHR in which an interpretation of the Convention's provisions is given.[541] The RCC has similarly affirmed in its Resolution N2-P of 5 February 2007 that judgments of the Strasbourg Court, in which the interpretation of the rights and freedoms defined in the Convention is provided, constitute an integral part of the Russian legal system, and should therefore be taken into account by the federal legislature and law enforcement agencies.[542]

However, neither the Supreme Court nor the RCC clarified whether this interpretation of the Convention's norms should be applied as a source of law or whether it was merely recommendatory, and whether account should be taken only of ECtHR's judgments exclusively concerning Russia, or whether it also covered case law regarding other countries.

No uniform approach was elaborated so far as to how this direction 'to take into account' should be interpreted. It has been argued that it could be read as a moral duty 'to have regard to, but not be obliged in any way to follow'.[543] Anton Burkov believes that, since the statement was made in a decision of the RCC, the interpretation of the Convention by the Strasbourg Court contained either in the judgments against Russia or other contracting parties

539 RCC, Resolution N1-P of 25 January 2001 'Po delu o proverke konstitutzionnosti polozheniya punkta 2 statyi 1070 Grazhdanskogo Kodeksa Rossiiskoi Federatzii v svyazi s zhalobami grazhdan I V Bogdanova, A B Zernova, S I Kalyanova, N V Truhanova' [On verification of constitutionality of provisions of para 2 of art 1070 of the Civil Code of the Russian Federation in connection with the complaints of citizens I V Bogdanova, A B Zernova, S I Kalyanova, N V Truhanova // Bull RCC 2001, N3, para 6 subpara 4.

540 Plenum of the Supreme Court of the Russian Federation, Ruling N12 of 10 October 2003 'O primenenii sudami obwei yurisdiktzii obwepriznannih printzipov y norm mezhdinarodnogo prava y mezhdunarodnih dogovorov Rossiskoi Federatzii' [On the application of generally recognised principles and norms of International law and international treaties of the Russian Federation] // Bull Supreme Court of the Russian Federation 2003, N3, para 11.

541 Plenum of the Supreme Court of the Russian Federation, Ruling N23 of 19 December 2003 'O sudebnom reshenii' [On the decision of the court] // RG N3374, 26 December 2003, para 4.

542 RCC, Resolution N2-P of 5 February 2007 'Po delu o proverke konstitutzionnosti polozhenii statei 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 y 389 Grazhdanskogo Protzessualnogo Kodeksa Rossiskoi Federatzii v svyazi s zaprosom Kabineta Ministrov Respubliki Tatarstan, zhalobami Otkritih Aktzionernih Obwestv 'Nizhnekamskneftekhim' y 'Khakasenergo', a takzhe zhalobami ryada grazhdan' [On verification of the constitutionality of provisions of arts 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 and 389 of the Civil Procedure Code of the Russian Federation in connection with the request of the Cabinet of Ministers of the Republic of Tatarstan, complaints of Joint Stock Company 'Nizhnekamskneftekhim' and 'Khakasenergo', as well as complaints of several citizens] // RG N4294, 14 February 2007, para 2.1 subpara 2.

543 Kirill Koroteev and Sergei Golubok, 'Judgment of the RCC on Supervisory Review in Civil Proceedings: Denial of Justice, Denial of Europe' (2007) 7 (3) HRLR 619, 624.

to the Convention is binding on the state.[544] This would mean that the RCC, having interpreted Article 15(4) of the Constitution broadly, acknowledged that the national courts are obliged to adhere to the case law of the Strasbourg Court, which composes a part of the Russian legal system.

Bogdan Zimnenko has argued that the Strasbourg Court's judgments may fairly be regarded as precedents of interpretation,[545] because the ECtHR, when deciding the cases, interprets the norms of the Convention.[546] By contrast, Irina Metlova has argued that, even if the ECtHR interprets the provisions of the Convention in each decision, its judgments are rendered in the context of a particular case, and interpretation of the Convention is not the reason for the case being heard.[547] Based on this, it could be assumed that the nature of the judgments of the ECtHR is dual.[548] This means that they are incorporated into the Russian legal system as acts of individual resolution of specific disputes, which are binding on the state concerned, and also as acts of official interpretation of the Convention that constitute a precedent for the resolution of similar future cases.

This understanding was reaffirmed in the Ruling of the Plenum of the Supreme Court of the Russian Federation of 27 June 2013,[549] in which it held that the interpretation of the ECHR given by the ECtHR in a particular case in respect of Russia is binding on the courts as it serves the function of subsidiary argument, and when the domestic constitutional level of protection of human rights is lower than that provided by the ECHR. The interpretation of the ECHR given by the ECtHR in respect of other contracting parties to the Convention should be taken into account by national courts if the circumstances of the case under consideration are similar.[550] Such a broad understanding of the state's obligations arising from the Convention

544 Burkov (n 89) 84.

545 Anatoly Vengerov, *Teoriya Gosudarstva y Prava* [Theory of State and Law] (3rd edn, Yurisprudencia 2000) 353.

546 Bogdan Zimnenko, 'Resheniya Evropeiskogo Suda po Pravam Cheloveka y Pravovaya Sistema Rossiskoi Federatzii' [Decisions of the European Court of Human Rights and the Legal System of the Russian Federation] (2004) 2 Moscow JIL 73.

547 Irina Metlova, 'Resheniya Evropeiskogo Suda po Pravam Cheloveka v Sisteme Istochnikov Rossiskogo Prava' [Decisions of the European Court of Human Rights in the Hierarchy of Legal Acts of the Russia Law] (PhD thesis, M 2007) 9-10.

548 Gennadiy Kurdyukov and Farida Valiullina, 'The Legal Nature of Judgments of the European Court of Human Rights' in Conference Materials X International Student Conference 2010 iSLaCo 'Legal Conficts and Gaps in the Legislation' (St. Petersburg 2010) 117.

549 Plenum of the Supreme Court of the Russian Federation, Ruling N20 of 27 June 2013 'O primenenii sudami obwei yurisdiktzii Konvencii o Zawite Prav Cheloveka y Osnovnih Svobod ot 4 noyabrya 1950 y Protokolov k nei' [On the application by the courts of general jurisdiction of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and its Protocols] // RG N6121, 5 July 2013.

550 ibid, para 2 subpara 1, 2.

goes beyond the meaning of Article 1 of the Federal Law 'On the ratification of the ECHR'.

Despite the Plenum of the Supreme Court clearly stating that the incorrect interpretation or application by national courts of principles and norms of international law and international treaties of the Russian Federation might be grounds for annulment or modification of the judicial act,[551] in practice judges retain considerable discretion.[552] This could unfortunately lead to conflict situations between the Strasbourg Court and the domestic courts, particularly the RCC, as has already taken place as a consequence of the ECtHR judgment in *Konstantin Markin v Russia.*[553]

2.3.2 *Markin v Russia*

Former Judge of the RCC, Nikolay Vitruk, has argued that an unconditional acceptance of the case law of the Strasbourg Court in the Russian Federation 'could seriously weaken the legal force of the Constitution'.[554] These concerns increased following the judgment by the Strasbourg Court in *Konstantin Markin v Russia* which highlighted the problem of competing jurisdictions of the ECtHR and the RCC. Markin, a divorced father of three and soldier in the Russian Army, was excluded from entitlement to parental leave. Having unsuccessfully claimed before the national courts for three years' parental leave in order to take care of his children,[555] he appealed to the RCC,[556] challenging the constitutionality of the provisions of

551 Plenum of the Supreme Court, Ruling N12 of 10 October 2003 (n 540), para 9.

552 Lech Garlicki, 'Sotrudnichestvo y Konflikt (Nekotorie Nablyudeniya iz Praktiki Vzaimodeistviya Evropeiskogo Suda po Pravam Cheloveka y Nacionalnih Organov Konstitutzionnogo Pravosudiya' [Cooperation and Conflict (Several Observations from the Practice of Interaction Between the European Court of Human Rights and the National Constitutional Bodies)] (2006) 1(54) Comp Const Rev 43, 52.

553 *Konstantin Markin v Russia* App no 30078/06 (ECHR, 7 October 2010).

554 Nikolay Vitruk, 'O Nekotorih Osobennostyah Ispolzovaniya Reshenii Evropeiskogo Suda po Pravam Cheloveka v Praktike Konstitutzionnogo Suda Rossiskoi Federatzii y Inih Sudov' [Some Particularities of Application of the Judgments of the European Court of Human Rights in the Practice of the RCC and Other Courts] in *Collection of Essays: Enforcement of the Decisions of the European Court of Human Rights in the Practice of Constitutional Courts in Europe* (M 2006) 183, 184.

555 *Markin* (n 553), paras 5-18.

556 RCC, Resolution N187-O-O of 15 January 2009 'Ob otkaze v prinyatii k rassmotreniyu zhalob grazhdanina Markina Konstantina Aleksandrovicha na narushenie ego konstitutzionnih prav polozheniyami statei 13 y 15 Federalnogo zakona 'O Gosudarstvennih posobiyah grazhdanam, imeyuwih detei', statei 10 y 11 Federalnogo zakona 'O statuse voennosluzhawih', statyi 32 Polozheniya 'O poryadke prohozhdeniya voennoi sluzhbi' y punktov 35 y 44 Polozheniya o 'Naznachenii y viplate gosudarstvennih posobii grazhdanam, imeyuwih detei' [On refusal to review the complaint of Konstantin Aleksandrovich Markin regarding a violation of his constitutional rights under the provisions of arts 13 and 15 of the Federal Law 'On State Aid to Citizens who have Children', arts 10 and 11 of the Federal Law 'On the Status of Military Personnel', art 32 of the Regulations 'On the Military Service', and arts 35 and 44 of the Regulation 'On the Award and Payment of State Assistance to Citizens who have Children'] // The text officially was not published, available at <http://www.garant.ru/products/ipo/prime/doc/1690938/ > accessed 17 October

Article 11(13) of the Federal Law 'On the Status of Military Personnel'[557] and Article 32(5) of the Regulation on Military Service[558] as incompatible with the equality principles enshrined in Articles 19(2) and (3), 38(2) and 55(3) of the Constitution as there was only provision for servicewomen.

In its Resolution of 15 January 2009, the RCC held that those who were involved in military service had a constitutional duty to protect the public interest, and therefore enjoyed a special legal status which curtailed certain civil rights and freedoms.[559] The RCC affirmed that military personnel who voluntarily accepted this status were obliged by Article 10(1) of Federal Law and Article 37(1) of the Constitution to abide by the national legislation in order to defend the interests of the state.[560]

It has been emphasised that the contested provisions were not per se 'incompatible with the Constitution' [561] as, in accordance with Article 1(2) of the Convention concerning discrimination in respect of employment and occupation 'any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof should not be deemed to be discrimination'.[562] Although the Russian legislation did not envisage three years' parental leave for servicemen, it secured their right to three months' leave to resolve childcare issues under certain circumstances.[563] If a serviceman decides to look after the child on his own, the Federal Law 'On Military Duty and Military Service' guarantees him a right to early discharge for family reasons.[564] Thus, any combination of military duties and the right to paid parental leave for men is prohibited.[565] Having clarified that granting parental leave only to servicewomen the legislature deferred to their limited participation in military operations and the special role of motherhood, which corresponded to Article 38(1) of the Constitution, the RCC concluded that no violation of the equality of rights guaranteed under Article 19(2) and (3) of the Constitution had taken place.[566]

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557 Federal Law N76-FZ 'O Statuse Voennosluzhawih' [On the Status of Military Personnel] 1 June 1998 // RG N 104, 2 June 1998.

558 Polozhenie o Poryadke Prohozhdeniya Voennoi Sluzhbi [Regulation on Military Service], enacted by Presidential Decree of 16 September 1999 N1237 // SZ RF 20 September 1999. N38, St 4534.

559 RCC, Resolution N187-O-O of 15 January 2009 (n 556), para 2.1.

560 ibid.

561 ibid.

562 ILO Convention No 111 (adopted 25 June 1958, entered into force 15 June 1960) 362 UNTS 31.

563 Regulation on Military Service (n 558), art 32 (7).

564 Federal Law N53-FZ 'O Voinskoi Obyazannosti y Voennoi Sluzhbe' [On Military Duty and Military Service] 28 March 1998 // RG N 63-64, 2 April 1998, art 51 para 3в subpara 5.

565 RCC, Resolution N187-O-O of 15 January 2009 (n 556), para 2.2 subpara 3.

566 ibid, para 2.2 subpara 5.

The logic of the approach of the RCC in justifying restrictions on military servicemen because military service is accepted voluntarily is flawed; it begs the question of how a serviceman should behave if he began to raise his children whilst already in the military. It could be presumed that in this case the early termination of employment would be expected.

The ECtHR, having overruled in 2010 the decision of the RCC in *Markin*, was strongly criticised by Valery Zorkin who warned 'against over-politicising of the ECtHR's actions' and pointed out that the Strasbourg Court's judgment showed a 'lack of respect for Russia's legislators'.[567] The Russian government expressed its dissatisfaction with that the judgment of the ECtHR required the state to take measures to cease discrimination against servicemen as regards their entitlement to parental leave.[568] Given that the contracting parties to the Convention were free to choose their own ways of eliminating violations revealed by the ECtHR, Zorkin had some doubts over whether in the context of Article 46 of the Convention the Strasbourg Court was competent to recommend the respondent state to make the necessary changes to national legislation.[569] He argued that the exercise of such power goes beyond the scope of competence established by the Convention, and could be perceived as a direct intrusion into national sovereignty. The question might arise as to what extent those decisions would be enforceable in the Russian legal system if the issue of constitutionality of the contested provision had already been decided by the RCC. Zorkin drew attention to the need for finding ways to safeguard the sovereignty of the state and show respect for the Convention in order to comply with its obligations.

Having referred to the FCC's position in *Görgülü*, in which it held that there is no contradiction with international law if the legislature does not comply with it to uphold 'fundamental principles of the constitution',[570] Zorkin has called on Russia and other countries to rely on this German precedent when resolving such challenging situations insofar as it is based on the constitutional principle of state sovereignty and the principle of supremacy of the Constitution.[571]

567 Zorkin (n 534).
568 *Markin* (n 553), para 67; Anna Pushkarskaya, 'Strasburg Smyagchil Konflikt s Konstitutzionnim Sudom, no ne Otkazalsya ot Svoei Pozitzii v Dele Markina' [Strasbourg has Mitigated the Conflict with the Constitutional Court, but Did Not Give Up His Position in Markin Case] *Kommersant* 51 (Moscow, 23 March 2012) 3 <http://www.kommersant.ru/doc/1898615> accessed 17 September 2015.
569 Zorkin (n 534).
570 BVerfGE 111, 307 (n 443), para 35.
571 Zorkin (n 534).

Claiming that each decision of the Strasbourg Court is not only a legal, but also a political act, Zorkin asserted that Russia should unconditionally implement only those judgments that were handed down in the interests of the protection of the fundamental rights and freedoms of its citizens, but if they encroach on national sovereignty and basic constitutional principles it should develop a defence mechanism against them.[572] He underlined that the problem of contradictory decisions of the RCC and the ECtHR must be decided only through the prism of the Constitution.[573]

Former President of the Russian Federation, Dmitry Medvedev, as a guarantor of the Russian Constitution,[574] declared in 2010 that it is of great importance to continue strengthening the authority of the RCC and the national judicial system to secure the protection of the rights and interests of the citizens through domestic legal mechanisms.[575] He argued that, although Russia had entrusted the Strasbourg Court with the power to decide cases of human rights abuses, it had never transferred that part of its sovereignty that would give any international or foreign court the right to render judgments requiring the amendment of the national legislation. Medvedev warned against any such attempt and pointed out that in view of such tense relationship with the ECtHR Russia might even withdraw from its jurisdiction.[576]

The Russian government, having not accepted the position of the ECtHR that found a violation of Articles 14 and 8 ECHR,[577] appealed against the decision in *Markin* to the Grand Chamber, which delivered its verdict on 22 March 2012.[578] Referring in its reasoning to various international documents such as those of the UN,[579] the CoE,[580] the EU,[581] the case-law of the CJEU[582] and a comparative study of the legislation of thirty-three member states of the CoE,[583] the Chamber confirmed that in a majority of European countries,[584] progress in

572 ibid.
573 ibid.
574 Russian Constitution (n 532), art 80 (2).
575 Ivan Rodin, 'Medvedev Garantiroval Rossii Suverenitet' [Medvedev Guaranteed Russia the Sovereignty] *Nezavisimaya Gazeta* (Moscow, 13 December 2010) <http://www.ng.ru/politics/2010-12-13/3_suverenitet.html> accessed 7 September 2015.
576 William E Pomeranz, 'Uneasy Partners: Russia and the European Court of Human Rights' (2012) 19(3) Human Rights Brief 17, 21.
577 *Markin* (n 553), para 98.
578 *Konstantin Markin v Russia (GC)* (2012) 56 EHRR 88.
579 ibid [49]-[54].
580 ibid [55]-[62].
581 ibid [63]-[64].
582 ibid [65]-[70].
583 ibid [71]-[75].
584 ibid [74].

guaranteeing equal sharing of responsibilities between men and women in children's upbringing has been made.[585]

Given the increased role of men in raising children and that the RCC did not justify the restrictions on servicemen by reference to a potential threat to the operational effectiveness of the armed forces,[586] the Grand Chamber upheld the decision of the ECtHR, but this time no recommendations requiring an amendment to national legislation were made. Former Russian Judge at the ECtHR, Anatoly Kovler, has described this softened approach as 'political correctness',[587] which reaffirms that the ECtHR is not a 'fourth-instance court', and so avoids 'the re-examination of issues of fact and law decided by national courts'.[588]

Having obtained the final decision of the Grand Chamber, Markin, relying on subparagraph 4 of Article 392(4) of the Civil Procedure Code of the Russian Federation (GPK),[589] which lists among the grounds for reviewing judicial decisions a violation of the ECHR established by the ECtHR, has filed a petition with the St. Petersburg Regional Court seeking to reopen the case. However, given that subparagraph 3 of this Article lists among the grounds for review a non-compliance with the Russian Constitution of the law in question declared by the RCC in a specific case, the St. Petersburg Regional Court refused to reopen the proceedings. The Regional Court observed that Markin had already been compensated for non-pecuniary damage and the decision of the Grand Chamber as regards the restoration of individual rights had been fully enforced. Reopening proceedings to review the claims for parental leave was not possible as Markin was no longer in the army having been medically discharged, and in any case his son was over three years old.[590]

It is interesting to note that within the frame of *Markin* case the RCC ruled on compatibility of the legislation with the Constitution, while the ECtHR found a violation of the provisions of the Convention based on the law of the Russian Federation, which was not found by the RCC. The St. Petersburg Regional Court asserted that resolving such controversial constitutional

585 ibid [140].
586 ibid [137].
587 Pushkarskaya (n 568).
588 Izmir Declaration (2011) High Level Conference on the Future of the European Court of Human Rights (adopted on 27 April 2011), para F(2C).
589 Grazhdanskii Protzessualnii Kodeks Rossiskoi Federatzii N138-FZ [Civil Procedure Code of the Russian Federation] 14 November 2002 // RG. N220, 20 November 2002.
590 Regional Court of St. Petersburg, Decision of 30 August 2012 <http://files.sudrf.ru/630/user/Opred_Markin.doc> accessed 21 August 2015.

and conventional issues did not fall within its competence.[591] The Leningrad District Military Court disagreed with the conclusion of the Regional Court,[592] and the appeal has been transferred to the Presidium, which suspended proceedings and turned to the RCC to verify the constitutionality of Article 11 and subparagraphs 3 and 4 of Article 392(4) GPK.[593]

In its Resolution of 6 December 2013,[594] the RCC affirmed that subparagraph 4 of Article 392(4), read in conjunction with paragraphs 1 and 4 of Article 11 GPK, had not been contrary to Article 15 of the Constitution. These provisions did not prevent a court reopening a case after an unsuccessful application to the RCC alleging infringement of constitutional rights and freedoms if the ECtHR established a violation of the claimant's rights under the ECHR.[595] The RCC emphasised that if a court of general jurisdiction concludes that it cannot execute the Strasbourg Court's decision without acknowledging the incompatibility of particular legal provisions with the Constitution, which previously had not been found by the RCC to violate the constitutional rights of the applicant, it could suspend the proceedings and request that the RCC review the constitutionality.

Following *Markin*, the speaker of the Parliament's Upper House, Aleksandr Torshin, submitted to the state Duma a draft bill[596] to amend the Federal Constitutional Law 'On the RCC'[597] in order to secure the supremacy of the Constitution.[598] This encouraged the

591 ibid.
592 Leningrad Military District Court in St. Petersburg, Decision N644-AG of 15 November 2012.
593 Leningrad Military District Court in St. Petersburg, Decision of 30 January 2013.
594 RCC, Resolution N27-P of 6 December 2013 'Po delu o proverke konstitutzionnosti polozhenii statyi 11 y punktov 3 y 4 chasti chetvertoi statyi 392 Grazhdanskogo Protzessualnogo Kodeksa Rossiskoi Federatzii v svyazi s zaprosom Prezidiuma Leningradskogo Okruzhnogo Voennogo Suda' [On verification of the constitutionality of the provisions of art 11 and subparas 3 and 4 of art 392 (4) of the Civil Procedure Code of the Russian Federation in connection with the request of the Presidium of the Leningrad Military District Court] // RG N 6261, 18 December 2013
595 ibid, para 3(2) subpara 5.
596 Draft Law N564346-5 of 16 June 2011 'O Vnesenii Izmenenii v Otdelnie Zakonodatelnie Akti Rossiskoi Federatzii (Ob Utochnenii Poryadka Obraweniya v Konstitutzionnii Sud Rossiskoi Federatzii s Zaprosom o Proverke Konstitutzionnosti Normativnih Aktov y Poryadka Obraweniya v Mezhgosudarstvennie Organi po Zawite Prav y Svobod Cheloveka)' [On Amendments to Certain Legislative Acts of the Russian Federation (on Clarification the Procedure of Applying to the Constitutional Court of the Russian Federation with a view to Submitting a Request to Review the Constitutionality of Regulations and Procedures for Bringing the Case to the International Bodies for the Protection of Human Rights and Freedoms)] <http://asozd.duma.gov.ru> accessed 19 October 2015.
597 Federal Constitutional Law N1-FKZ 'O Konstitutzionnom Sude Rossiskoi Federatzii' [On the Constitutional Court of the Russian Federation] 21 July 1994 // RG N138-139, 23 July 1994 (FKZ 'On the RCC').
598 Tamara Shkel, 'Otvet Strasburgu: Duma Gotova Dat Konstitutzionnomu Sudu Polnomochiya po Ekspertize Mezhdunarodnih Dogovorov' [The Answer to Strasbourg: The Duma is Ready to Give the Constitutional Court the Authority to Examine the International Treaties] *RG* N5507 (131) (Moscow, 21 June 2011) <http://www.rg.ru/2011/06/20/konstituciya-site.html> accessed 17 July 2015; Russian RT News, 'Duma Considers Law to Limit Influence of the European Court on Russia's Legal System' (RT, 20 June 2011) <http://rt.com/politics/torshin-european-court-russia/> accessed 19 October 2015.

legislators to pass Federal Constitutional Law N9-FKZ in 2014, Article 1(19) of which inserted the following paragraph into Article 101 FKZ 'On the RCC':

> 'the court when reviewing the case under those specific circumstances envisaged by the procedural legislation in view of the adoption of a decision by an interstate body for the protection of human rights and freedoms, in which a violation of human rights and freedoms in the application of law or its certain provisions is recognised, if comes to a conclusion that the possibility of application of the relevant law can be resolved only after verification of its conformity to the Constitution of the Russian Federation, requests the RCC to review the constitutionality of this law'.[599]

Khudoley has argued that in such a situation, the RCC, with a view to resolving the issue of applying this legal act for the implementation of the Strasbourg Court's judgments, will be engaged in reviewing its own decisions.[600] Even if the national legislation and the judicial practice of the RCC, as stated in Resolution N6-O of 16 May 2000, did not allow to subject to appeal the decisions of the RCC as it would be inconsistent with its nature as a body of constitutional control,[601] the very fact that the RCC found no violation of the applicant's constitutional rights cannot prevent the Court considering the request.

Such a challenging situation was created by the RCC itself when it called on the federal legislature[602] to amend GPK to guarantee adequate avenues for re-examination of a case, including reopening of proceedings in cases where a violation of the Convention was recognised by the ECtHR.[603] Playing an essential role in the integration of the Convention and the Strasbourg Court's case law into the Russian legal system,[604] the RCC secured the state's

599 Federal Constitutional Law N9-FKZ 'O Vnesenii Izmenenii v Federalnii Konstitutzionni Zakon 'O Konstitutzionnom Sude Rossiskoi Federatzii' [On Amendments to the Federal Constitutional Law 'On the RCC'] 4 June 2014 // RG N127, 6 June 2014.

600 Khudoley (n 88) 97.

601 RCC, Resolution N6-O of 13 January 2000 'Po zhalobe Dudnik Margariti Viktorovni na narushenie ee konstitutzionnih prav chastyu pervoi statyi 79 Federalnogo Konstitutzionnogo Zakona 'O Konstitutzionnom Sude Rossiskoi Federatzii'' [On the complaint of Dudnik Margarita Viktorovna on violation of her constitutional rights by part one of art 79 of the Federal Constitutional Law 'On RCC'] // SZ RF 2000. N11, St 1244.

602 ibid [3.5].

603 RCC, Resolution N4-P of 26 February 2010 'Po delu o proverke konstitutzionnosti chasti vtoroi statyi 392 Grazhdanskogo Protzessualnogo Kodeksa Rossiiskoi Federatzii v sviazi s zhalobami grazhdan A A Doroshka, A E Kota, y E I Fedotovoi' [On verification of the constitutionality of part 2 of art 392 of the Civil Procedure Code of the Russian Federation in respect of the complaints of citizens A A Doroshok, A E Kot, and E I Fedortova] // RG N5130, 12 March 2010, para 2.1 subpara 4.

604 RCC, Resolution N8-P of 16 May 2000 'Po delu o proverke konstitutzionnosti otdelnih polozhenii punkta 4 statyi 104 Federalnogo Zakona 'O Nesostoyatelnosti (Bankrotstve)' v svyazi s zhaloboi kompanii 'Timber Holdings International Limited' [On verification of constitutionality of certain provisions of para 4 of art 104 of the Federal Law 'On Insolvency (Bankruptcy)' in connection with complaint of 'Timber Holdings International Limited' Company] // SZ RF 2000. N21, St 2258.

compliance with the Recommendation of the Committee of Ministers of 19 January 2000.[605]

According to Khudoley, it would not be right to endow the RCC with a veto power over the decisions of the ECtHR because by verifying the constitutionality of the enforcement of judgments of the Strasbourg Court, the RCC will inevitably be interpreting the ECtHR's decisions and therefore provisions of the ECHR, and this would violate Article 46 of the Convention.[606] Since constitutional control over the decisions of international bodies was not allowed, and Article 125 (para 1 sec 'г') of the Russian Constitution permitted constitutional control only of those treaties that have not entered into force, Vitruk proposed to establish a rule for a mandatory verification of compliance of international treaties concerning human rights with the Constitution.[607]

Extending the authority of the RCC risks conflict with Article 15(4) of the Constitution stipulating that ratified international treaties should be implemented in good faith, and with Article 27 of Vienna Convention on the Law of Treaties under which 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. [608] Aleksandr Kokotov, Judge at the RCC, has argued that a decision of the Constitutionl Court which acknowledges the constitutionality of the contested legal norm which has been recognised as not compatible with the ECHR by the Strasbourg Court would not mean the blocking of implementation of the ECtHR's judgment requiring the amendment of the national legislation. This would underline that the problem which led to a finding of a violation by the ECtHR lies not in the legislative act itself, but in the practice of its application and that the existing model of the legal regulation is inadequate, and so a decision of the RCC would not relieve the legislature of responsibility to implement the ECtHR's judgment.[609]

It was obvious in *Markin* that amendment of the legislation in question was possible, and the

605 CM, Recommendation to member states on the re-examination or reopening of certain cases at domestic level following judgments of the ECtHR, Rec (2000) 2, 19 January 2000.

606 Khudoley (n 88) 97.

607 Nikolay Vitruk, *Vernost Konstitutzii* [Loyalty to the Constitution] (RAP 2008) 80.

608 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331; Anna Sevortian, 'Moscow Attempts to Elbow Strasbourg Aside' (Open Democracy: Russia and Beyond, 5 September 2011) <http://www.opendemocracy.net/print/61259> accessed 17 October 2015.

609 Aleksandr Kokotov, 'Nasuwnie Voprosi Regulirovaniya Deyatelnosti Konstitutzionnogo Suda Rossiskoi Federatzii' [Current Questions of Regulation of the RCC's Acitivity] (2012) 2 Russian LJ 20, 27.

Russian Ministry of Defence published a draft regulation in June 2011[610] aiming to secure fathers' rights to paternity leave and providing them with a monthly benefit as envisaged by law.[611] However, the draft still limited the right to parental leave for servicemen, which could be granted only subject to certain conditions. Alignment of men's and women's rights could be achieved, but it would be difficult to ensure equal rights. Notwithstanding this, the draft has already passed the first reading in the Duma Committee on Defence, and will undoubtedly strengthen state support for families guaranteed under Article 7(2) of the Constitution.

A new struggle between the Strasbourg Court and the RCC was provoked by the decision of the ECtHR in *OAO Neftyanaya Kompaniya Yukos v Russia.*[612] The ECtHR, having found a violation of Article 1 of Protocol No 1 to the Convention, ordered Russia to pay former Yukos shareholders €1.87 billion compensation for unfair tax proceedings.[613] Given that public officials expressed their doubts as regards the correctness of the ECtHR's judgment, the state failed to comply with its obligations under the Convention.[614]

In view of this, a group of deputies of the Duma submitted a request to the RCC to clarify the extent to which the judgment of the ECtHR that was contrary to the interpretation of the Russian legislation by the RCC which in its decisions of 2001[615] and 2005[616] confirmed the

610 Draft Law N540300-6 'O Vnesenii Izmenenii v Otdelnie Zakonodatelnie Akti Rossiskoi Federatzii v Chasti Predostavleniya Voennosluzhawim Muzhskogo Pola, Prohodyawim Voennuyu Sluzhbu po Kontraktu, Otpuska po Uhodu za Rebenkom do Dostizheniya im Vozrasta Treh Let' [On Amendments to Certain Legislative Acts of the Russian Federation in the Part Allowing the Male Soldiers Undergoing Military Service on a Contractual Basis Parental Leave up to Three Years] <http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=540300-6&02> accessed 27 September 2015.

611 Federal Law N255-FZ 'Ob Obyazatelnom Socialnom Strahovanii na Sluchai Vremennoi Netrudosposobnosti y v Svyazi s Materinstvom' [On Obligatory Social Insurance in case of Temporary Incapacity to Work and in Connection with Maternity] 29 December 2006 // RG N297, 31 December 2006.

612 *OAO Neftyanaya Kompaniya Yukos v Russia* (2012) 54 EHRR 19.

613 ibid [36]; Gabriele Steinhauser and Gregory L White, 'Russia Must Compensate Yukos Shareholders, Says European Court' (The Wall Street Journal, 31 July 2014) <http://www.wsj.com/articles/russia-must-compensate-yukos-shareholders-says-european-court-1406797417> accessed 29 September 2016.

614 Interfaks, 'Minyust Schel Bezosnovatelnim Resheniya ESPCH o Kompensatzii Aktzioneram Yukosa' [The Ministry of Justice Considers Unreasonable the Decision of the ECtHR on Compensation the Shareholders of Yukos] *Vedomosti* N2851 (Moscow, 15 June 2015) <http://www.vedomosti.ru/business/news/2015/06/15/596397-minyust-schel-bezosnovatelnimi-resheniya-espch-o-kompensatsiyah-aktsioneram-yukosa> accessed 15 August 2015.

615 RCC, Resolution N13-P of 30 July 2001 'Po delu o proverke konstitutzionnosti polozhenii podpunkta 7 punkta 1 statyi 7, punkta 1 statyi 77 y punkta 1 statyi 88 Federalnogo Zakona 'Ob Ispolnitelnom Proizvodstve' v svyazi s zaprosami Arbitrazhnogo suda Voronezhskoi Oblasti, Arbitrazhnogo suda Saratovskoi Oblasty y zhalobami Otkritogo Aktzionernogo Obwestva 'Razrez' Izyhsky' [On verification of the constitutionality of the provisions of subpara 7 para 1 of art 7, para 1 of art 77 and para 1 of art 81 of the Federal Law 'On Enforcement Proceedings' in connection with the requests of the Arbitration Court of Voronezh Region, the Arbitration Court of the Saratov Region and the complaint of the Joint Stock 'Razrez' Izyhsky] // RG N150, 8 August 2001.

616 RCC, Resolution N36-O of 18 January 2005 'Ob Otkaze v Prinyatii k rassmotreniyu zhalobi Otkritogo

constitutionality of the relevant provisions of the Russian Tax Code[617] and the Federal Law 'On Enforcement Proceedings'[618] could be enforced in Russia. The study suggests now to proceed with the analysis of the response of the RCC which attempted to resolve the jurisdictional tension between these judicial bodies.

2.3.3 A warning message from the RCC

In its Resolution N21-P of 14 July 2015,[619] the RCC emphasised the importance of safeguarding the sovereignty of the state, the supreme legal force of the Constitution, and of prohibiting the incorporation of international treaties which might either restrict human rights or encroach on the country's constitutional order. The Court declared that neither the ECHR nor its interpretation by the ECtHR which evaluated national legislation or required changes thereto could undermine the supremacy of the Constitution, and that it would be implemented only if its higher legal force was recognised.[620] The Court relied in its reasoning on the decision in *Görgülü* in which the FCC made it clear that the state could withdraw from its obligations under international treaty, when such derogation represented the only way to avoid a violation of fundamental principles of the Constitution.[621] If the interpretation of the Convention by the ECtHR was carried out in contradiction of the object and purpose of the

Aktzionernogo Obwestva 'Neftyanaya Kompaniya 'YUKOS' na narushenie konstitutzionnih prav y svobod polozheniyami punkta 7 statyi 3 y Statyi 113 Nalogovogo Kodeksa Rossiskoi Federatzii' [On Refusal to Accept for Consideration the Complaint of Joint Stock Company 'Oil Company 'YUKOS' on Violation of Constitutional Rights and Freedoms by the provisions of para 7 of art 3 and art 113 of the Tax Code of the Russian Federation] // Bull RCC 2005. N3.

617 Federal Law N146-FZ 'Nalogovii Kodeks Rossioskoi Federatzii' [Russian Tax Code] 31 July 1998 // RG N148-149, 6 August 1998.

618 Federal Law N229-FZ 'Ob Ispolnitelnom Proizvodstve' [On Enforcement Proceedings] 2 October 2007 // RG. N223, 6 October 2007.

619 RCC, Resolution N21-P of 14 July 2015 'Po delu o proverke konstitutzionnosti polozhenii statyi 1 Federalnogo Zakona 'O Ratifikatzii Konventzii o Zawite Prav Cheloveka y Osnovnih Svobod y Protokolov k nei', punktov 1 y 2 statyi 32 Federalnogo Zakona 'O Mezhdunarodnih Dogovorah Rossiskoi Federatzii', chastei 1 y 4 statyi 11, punkta 4 chasti 4 statyi 392 Grazhdanskogo Protzessualnogo Kodeksa Rossiskoi Federatzii, chastei 1 y 4 statyi 15, punkta 4 chasti 1 statyi 350 Kodeksa Administrativnogo Sudoproizvodstva Rossiskoi Federatzii y punkta 2 chasti 4 statyi 413 Ugolovno-Protzessualnogo Kodeksa Rossiskoy Federatzii v svyazi s zaprosom gruppi deputatov Gosudarstvennoi Dumi' [On verification of the constitutionality of provisions of art 1 of the Federal Law 'On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols', paras 1 and 2 of art 32 of the Federal Law 'On International Treaties of the Russian Federation', subparas 1 and 4 of art 11, subpara 4 of para 4 of art 392 of the Civil Procedure Code of the Russian Federation, subparas 1 and 4 of art 13, subpara 4 of para 3 of art 311 of the Arbitration Procedure Code of the Russian Federation, paras 1 and 4 of art 15, subpara 4 of para 1 of art 350 of the Code of Administrative Procedure of the Russian Federation and subpara 4 of para 2 of art 413 of the Criminal Procedure Code of the Russian Federation in connection with the request of the group of State Duma deputies] // RG N6734, 27 July 2015.

620 ibid, para 2.2 subpara 2.

621 ibid, para 2.2 subpara 4.

ECHR, the respondent state had a right to refuse to execute those judgments insofar as it went beyond treaty obligations accepted by the state on ratification of the Convention. Accordingly, the judgment of the Strasbourg Court would not have a binding force within the Russian legal system if it resulted in a breach of peremptory norms of international law (*jus cogens*), in particular the principles of sovereign equality, respect for the rights inherent in sovereignty, and non-intervention in the internal affairs of states.[622]

Given that the expression of the consent of the Russian Federation to be bound by the international treaty in violation of the Constitution may be revealed only after the interstate body had rendered its decision which was found to conflict with the Constitution, the RCC stressed that the issue was not whether the international treaty was valid, but whether it was possible not to comply with the obligation to apply the provisions of the treaty according to the interpretation given to it by the interstate body.[623] This would mean that the measures necessary for the enforcement of the judgment of the Strasbourg Court would not be taken in breach of the Russian Constitution.[624]

In its finding, the RCC referred not only to the decision of the FCC in *Görgülü* which recognised the limited legal force of the judgments of the ECtHR,[625] but also that of the Italian Constitutional Court in *Maggio*,[626] the Austrian Constitutional Court in *Miltner*,[627] and the Supreme Court of the United Kingdom in *R (Chester) v Secretary of State for Justice*.[628] It was stressed that in all cases of convention-constitutional conflict, the issue was not whether there was a contradiction between the ECHR and the national constitutions, but rather the collision between the interpretation of the ECHR by the ECtHR in a particular case and the interpretation of national constitutions by constitutional courts (or other higher courts vested with similar powers).[629] Resolution of such controversies in Russia is vested by the Constitution in the RCC, which only in exceptional cases will consider it possible to raise an objection, thus maintaining mutually respectful dialogue and contributing to the formation of the balanced practice of the ECtHR, and not isolating itself from the implementation of its decisions.

622 ibid, para 3 subpara 3.
623 ibid, para 3 subpara 8.
624 ibid, para 3 subpara 9.
625 ibid, para 4 subparas 5-8.
626 Corte Costituzionale, *Maggio* and *Others v Italy* (judgment no 264, 19 November 2012).
627 VfGH, *Miltner* B 267/86, 14 October 1987, 11500/1987 EuGRZ 1988, 166.
628 UKSC, *R (Chester) v Secretary of State for Justice* [2013] UKSC 63.
629 RCC, Resolution N21-P of 14 July 2015 (n 619), para 4 subpara 9.

To help regulate this legal conflict, on 15 December 2015 the President of the Russian Federation signed Federal Constitutional Law N7-FKZ[630] that introduced amendments to FKZ 'On the RCC' empowering the RCC to decide, on the request of federal executive authorities, issues of enforcement of the decision of interstate bodies for the protection of human rights based on the interpretation of the provisions of international treaties which conflict with the Constitution. Pursuant to Article 1 of this Law, the RCC would be entitled to make a ruling on implementation, in whole or in part, in accordance with the Constitution.

It appears that this legal act, taken in combination with the Resolutions of the RCC N27-P of 6 December 2013 and N21-P of 14 July 2015, may signal that Russia seeks to avoid serious complications in its relationships not only with the Strasbourg Court, but also with the CoE, where a judgment of the ECtHR suggests the amendment of national legislation that might cause a more significant violation of constitutional rights than the one objected to the ECtHR.

Several concerns have been expressed in the academic community in respect of such a formal acceptance of non-compliance with the Convention obligations. Ilya Shablinksy, a member of the Presidential Human Rights Council, has argued that citizens of the Russian Federation would be 'gradually isolated from international legal defenses'.[631] In an article entitled Putin 'Outlaws' European Justice in Russia', Vladimir Kara-Murza, a Russian politician and journalist stated that this 'effectively banishes international legal norms from Russian territory and denies Russian citizens access to European justice'.[632] President of the ECtHR, Guido Raimondi, has clearly indicated that such a filter mechanism is not acceptable to member states of the CoE, and constant resistance to enforcing the judgments of the ECtHR should lead to withdrawal from the organisation.[633] To avoid these consequences and to bolster the credibility of these judicial institutions, Andrej Hunko proposed to resolve emerging tensions

630 Federal Constitutional Court 'O Vnesenii Izmenenii v Federalnii Konstitutzionni Zakon 'O Konstitutzionnom Sude Rossiskoi Federatzii' N7-FKZ [On Amending the Federal Constitutional Law 'On the RCC'] 14 December 2015 // RG N6855, 16 December 2015.

631 Peter Hobson, 'Russia to rule on European Court of Human Rights Decisions' *The Moscow Times* (Moscow, 10 December 2015) <https://themoscowtimes.com/articles/russia-to-rule-on-european-court-of-human-rights-decisions-51167> accessed 15 August 2016.

632 Vladimir Kara-Murza, 'Putin 'Outlaws' European Justice in Russia' (World Affairs, 24 December 2015) <http://www.worldaffairsjournal.org/blog/vladimir-kara-murza/putin-%E2%80%98outlaws%E2%80%99-european-justice-russia> accessed 19 September 2016.

633 -- Russia should leave the European Council, if he refuses to execute decisions of the ECHR (Ukrainian Crisis, 29 January 2016) <http://ukrainiancrisis.net/news/16804> accessed 17 October 2016; Susan Stewart, 'Council of Europe Can Do without Russia' (Stiftung Wissenschaft und Politik, 13 May 2016) <http://www.swp-berlin.org/en/publications/point-of-view/council-of-europe-can-do-without-russia.html> accessed 17 August 2016.

between the courts through 'communication instead of mutual sanctions and demonisation'.[634]

As this power of the RCC to be a final arbiter on enforceability of the Strasbourg Court's judgments poses a threat to compliance with the state's international obligations, the Commission for Democracy through Law has recommended removing Articles 104.4 (2) and paragraph 2 of Article 106 FKZ 'On the RCC'[635] to ensure the most effective protection of individuals. This seems to be particularly important given that no mechanism has been created so far that would force member states to implement judgments of the ECtHR, and which is why they continue to formulate their own rules and selecting for enforcement only those judgments that best serve their interests.

2.3.4 *Anchugov and Gladkov v Russia*[636]

The RCC first exercised its authority to decide on enforcement of judgments of the ECtHR which contradict the Russian Constitution in *Anchugov and Gladkov*. The case deals with the alleged violation of the right to vote of two convicted prisoners. The ECtHR challenged the provisions of the Russian Constitution envisaged in Chapter 2, the amendments to or revision of which under Article 135(2) would require a special procedure for the adoption of new Constitution, and in so doing has triggered another open conflict with the RCC.

The applicants, both Russian nationals sentenced to fifteen years' imprisonment for multiple offences, claimed that the ban on any prisoners voting in parliamentary and in presidential elections irrespective of the seriousness of the committed crime and the length of the sentence, infringed a number of their constitutional rights.[637] Anchugov and Gladkov argued that this ban, affecting some 743,300 prisoners, could not be considered as part of the punishment as it was not specified in the Russian Criminal Code.[638] Despite being convicted, they remained members of civil society and held Russian citizenship, which entitled them to

634 Andrej Hunko and Rene Jokisch, 'Russlands Ausschluss aus dem Europarat Wäre ein Großer Fehler' [Russia's exclusion from the Council of Europe would be a Big Mistake] (IMI Standtpunkt 2016/022, 7 June 2016) <http://www.imi-online.de/2016/06/07/russlands-ausschluss-aus-dem-europarat-waere-ein-grosser-fehler/> accessed 13 September 2016.

635 CDL-AD(2016)016-e 'Russian Federation-Final Opinion On the Amendments to the Federal Constitutional Law on the Constitutional Court adopted by the Venice Commission at its 170th Plenary Session' (Venice, 10-11 June 2016), para 33.

636 *Anchugov and Gladkov v Russia* App nos 11157/04 and 15162/05 (ECHR, 4 July 2013).

637 ibid [18].

638 ibid [81], [82].

exercise their right to vote. [639]

The Government's argument was based on the necessity of increasing civic responsibility and respect for the rule of law, and ensuring the proper functioning of democratic institutions.[640] By denial of voting rights to prisoners it intended to avoid any negative effect of criminal leaders on the freedom of prisoners' choices in elections, and to strike a balance between the public interest in having law-abiding people as representatives of society, and the private interests of individuals excluded by law from the election process.[641]

In 2004 the RCC found that, under FKZ 'On the RCC' it had no jurisdiction to determine whether certain provisions of the Constitution were compatible with the others, and refused to accept Gladkov's complaint of a violation by Article 32(3) of the Constitution of his constitutional rights enshrined in Articles 3(3), 6(2), 17(1) and (2), and 19.[642] The RCC has stated that, under Article 16(2) of the Constitution, no other provisions of the Constitution may contradict the fundamental principles of the Russian constitutional system, and that its provisions constitute a consistent systematic unity.[643] Accordingly, the requirement of Article 32(3) could not be interpreted as infringing the principles of free elections and universal suffrage (Article 3(3), 32(1) and (2) and 81(1)) as well as not meeting the criteria for permissible restrictions of constitutional rights and freedoms (Article 55(3)).

In approaching the issue of disenfranchisement of prisoners, the Strasbourg Court applied two principles: discretionary and legal. In *Hirst v United Kingdom (no 2)* the ECtHR stressed that the imposed ban covering a 'wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity' was incompatible with Article 3 of Protocol No 1 to the Convention as it lacked proportionality and did not pursue a

639 ibid [84].
640 ibid [89], [102].
641 ibid [88] - [90].
642 RCC, Ruling N177-O of 27 May 2004 'Ob otkaze v prinyatii k rassmotreniyu zhalobi grazhdanina Gladkova Vladimira Mikhailovicha na narushenie ego konstitutzionnih prav chastyu 3 statji 32 Konstitutzii Rossiskoi Federatzii' [On refusal to accept a complaint of the citizen Gladkov Vladimir Mikhailovich on violation of his constitutional rights by art 32(3) of the Constitution of the Russian Federation], para 2 // <http://www.lawrussia.ru/texts/legal_123/doc123a320x420.htm> accessed 27 August 2016.
643 RCC, Resolution N12-P of 19 April 2016 'Po delu o razreshenii voprosa o vozmozhnosti ispolneniya v sootvetstvii s Konstitutziei Rossiskoi Federatzii postanovleniya Evropeiskogo Suda po Pravam Cheloveka ot 4 Iyulya 2013 goda po delu 'Anchugov y Gladkov Protiv Rossii' v svyazi s zaprosom Ministerstva Yustitzii Rossiskoi Federatzii' [On resolving the question of possibility of execution in accordance with the Constitution of the Russian Federation of the judgment of the ECtHR of 4 July 2013 in *Anchugov and Gladkov v Russia* in connection with the request of the Ministry of Justice of the Russian Federation] // RG N6963 (95). 5 May 2016, para 4.1 subpara 4.

legitimate aim.[644] In *Scoppola v Italy* the Grand Chamber, having observed that under Italian law voting restrictions were applied to serious offences 'against the state or the judicial system, or offenses punishable by a term of imprisonment of three years or more', concluded that disenfranchisement in Italy was not an automatic and indiscriminate, and that a decision was based on the particular circumstances of each case, and so the Italian authorities managed to operate within the limits of the margin of appreciation.[645]

By emphasising the importance of this right for 'establishing and maintaining the foundations of an effective and meaningful democracy',[646] the Strasbourg Court granted contracting states a wide margin of appreciation in this sphere, but under its own supervision.[647] In *Anchugov and Gladkov v Russia*, the Strasbourg Court stated that the blanket restriction covered a wide range of criminal offences including minor ones, and that it was applied automatically and indiscriminately regardless of the length of the sentences and gravity of the offence.[648] Since no analysis of the interdependence between the imposition of the sentence of imprisonment and the deprivation of the right to vote had been conducted, and neither were there convincing arguments presented that could justify those serious limitations on voting rights under Article 32(3) of the Constitution, it was thus evident that the state had exceeded the margin of appreciation. [649]

The Strasbourg Court recognised that changing the ban would require amendment of the Russian Constitution (Articles 64, 134 and 135 of the Constitution),[650] but this does not exempt the state from responsibility for all acts and omissions under Article 1 ECHR. Having acknowledged a violation of the right to vote that was guaranteed by Article 3 of Protocol No 1 of the Convention, but prohibited for prisoners under Article 32(3) of the Constitution, the ECtHR recommended that Russia either introduce legislative changes to clarify the restrictions, or leave it to the courts to evaluate the proportionality of the limitations.[651]

On 19 April 2016, at the request of the Ministry of Justice, the RCC has decided on the enforcement of the ECtHR's judgment in *Gladkov*. Given that there was no consensus among

644 *Hirst v the United Kingdom (no 2*) [2005] ECHR 681, paras 77, 79.
645 *Scoppola v. Italy* (*no 3*) (*GC*) App no 126/05 (ECtHR, 22 May 2012), paras 106, 108, 110.
646 *Hirst* (n 644), para 58.
647 *Anchugov* (n 636), paras 95, 97.
648 ibid [100], [105],[106]; Resolution of the RCC N12-P of 19 April 2016 (n 643), para 3 subpara 3.
649 *Anchugov* (n 636), paras 103, 106-110.
650 ibid [111].
651 ibid [107], [111].

the forty-three member states of the CoE on the issue of voting rights for prisoners, the RCC held that there were no reasons for interpreting the prohibition in Article 32(3) as applying only to certain categories of prisoners, for example, those convicted of serious offences.[652] There were likewise no grounds for interpreting it as implying, as Anchugov and Gladkov had done, the discretionary authority of the federal legislature to remove the restrictions in respect of all convicted offenders other than those sentenced to life imprisonment.[653] The RCC clarified that the ban on suffrage in respect of those serving a sentence of imprisonment, but not those serving other types of punishment comparable in its nature to imprisonment did not indicate a general and indiscriminate restriction on suffrage affecting all citizens deprived of their liberty by a court decision.[654]

Since the ban under Article 32(3) of the Constitution is imperative, in accordance with Articles 3(1) and (3), 15(1) and (4), 32(1) and (2), 46(3), 79 of the Russian Constitution the RCC has not recognised the possibility of executing the ECtHR's judgment by amending the legislation to allow not automatic restriction of voting rights on convicted persons.[655] However, it has confirmed that the judgment could be implemented in terms of general measures that ensure fairness, proportionality and differentiation in applying those restrictions as under Article 32(3) of the Constitution and the provisions of the Criminal Code of the Russian Federation the sentence of imprisonment, and so the disenfranchisement could not be imposed for minor offenses committed by offenders for the first time, and for crimes of medium gravity and grave crimes could be imposed by a court as a more severe type of punishment among those specified by Special Part of the Criminal Code, which could entail a deprivation of voting rights.[656]

In its finding the RCC stated that the Russian Federation may not conclude international treaties that do not comply with the Constitution, and if it did so, they could not be enforced in Russia.[657] Russia acceded to the ECHR, believing that Article 32(3) of the Constitution was consistent with the provisions of Article 3 of Protocol No 1 to the Convention, and therefore did not require any changes.[658] In view of this, the RCC affirmed that acknowledging by the Strasbourg Court a violation of Article 3 of Protocol No 1 was based on the interpretation that

652 *Anchugov* (n 636), para 42-45; RCC, Resolution N12-P of 19 April 2016 (n 643), para 4.3 subpara 5, 6.
653 Resolution N12-P of 19 April 2016 (n 643), para 4.4 subpara 1.
654 ibid, para 5.1 subpara 8.
655 ibid, paras 1, 3 s 'conclusion'.
656 ibid, para 2 s 'conclusion'.
657 ibid, para 4.2 subpara 4.
658 ibid.

diverged from the meaning which was accorded to it by the CoE and the Russian Federation as a contracting party, and thus the state had the right to insist on the interpretation of Article 3 of Protocol No 1 as it was when the treaty came into force in Russia.[659]

The RCC believes that proposed interpretation of Article 32(3) will assist in avoiding similar conflicts concerning restrictions on voting rights of prisoners.[660] It has pointed out that the federal legislature should consistently implement the principle of humanism in the criminal law to optimise the system of criminal punishment, including through transferring certain types of prison regimes to alternative forms of punishment, even implying forced confinement, but which did not entail restrictions on voting rights.[661] For that purpose, changes would be required in criminal and penal legislation under which those serving a sentence of imprisonment for crimes of negligence and crimes of small and medium gravity would be subject to a separate type of criminal penalty not entailing limitations under Article 32(3) of the Constitution.[662]

In this Resolution the RCC confirmed thst the judgments of the Strasbourg Court, particularly those proposing to make changes in the national legislation, would not challenge the supremacy of the Constitution in the Russian legal system. This means that the implementation of judgment in *Anchugov* would be acceptable if the interpretation by the ECtHR of Article 3 of Protocol No 1 to the ECHR on which it was based is consistent with the provisions of the Russian Constitution concerning individual rights and freedoms and the fundamentals of the constitutional system.[663]

Secretary General of the CoE has reacted to the decision of the RCC in a friendly way, stating that 'Russia was and remains [an] integral part of the European legal space, which commands an equal dialogue and readiness to compromise'.[664] By stressing that the possible way of resolving the present conflict could be the amendment of the legislation, 'which would alleviate the existing restrictions on the right to vote', Thorbjørn Jagland called on the Russian Parliament to elaborate appropriate solutions for executing the Strasbourg Court's

659 ibid, para 4.2 subpara 6.
660 ibid, para 5.4 subpara 3.
661 ibid, para 5.5 subpara 1.
662 ibid, para 5.5 subpara 4.
663 ibid, para 4.4 subpara 2.
664 -- 'Secretary General Comments on Russian Constitutional Court Judgment Today' (Council of Europe Portal, 19 April 2016) <http://www.coe.int/en/web/secretary-general/-/secretary-general-comments-on-russian-constitutional-court-judgment-today> accessed 17 October 2016.

judgment.[665]

To achieve balanced cooperation between the conventional and constitutional legal orders the state concerned would be expected to adhere faithfully to its obligations under the Convention, and the Strasbourg Court would be required to show respect for the national identity of the contracting party.[666] While celebrating the 20th anniversary of the RCC in 2011, former President of the Strasbourg Court, Jean-Paul Costa, argued that the protection of human rights in Russia had advanced from the day of ratification of the ECHR, and even if conflicts between the courts were inevitable, they had a common aim, and it is thus important to preserve a permanent dialogue, and not consider the recognition of a violation of the human rights as a 'defeat of the state, but rather a triumph of the human rights and the state governed by the rule of law'.[667]

2.4 Margin of appreciation in the jurisprudence of the ECtHR

2.4.1 Legal limits of the margin of appreciation

The doctrine of the margin of appreciation which has evolved in the jurisprudence of the ECtHR, seeks to afford some latitude to contracting parties for the purpose of complying with their obligations under the ECHR.[668] It is an important 'tool to define relations between the domestic authorities and the Court'[669] and allows states with diverse legal and cultural traditions the flexibility to coordinate their respective spheres of influence, safeguard their autonomy and avoid conflict situations with the ECtHR.[670] Jean-Paul Costa has argued that the application of the doctrine confirms that the Convention does not require a 'strict uniformity throughout Europe in the protection of human rights' and does not imply the 'wholesale standardisation of national institutions, procedures and practices'.[671] According to Yutaka-Arai Takahashi, this indicates that the Convention's mechanism for the protection of

665 ibid.
666 Resolution of the RCC N12-P of 19 April 2016 (n 643), para 1.2, subpara 2.
667 Anna Zakatnova, 'Starshii Sud: 30 Oktiabria Konstitutzionnyi Sud Otmechaet 20-letnii Yubilei' [The Senior Court: The Constitutional Court Marks its 20th Anniversary on October 30th] *RG* N5619 (243) (Moscow, 28 October 2011) <http://www.rg.ru/2011/10/28/torzhestvo.html> accessed 27 September 2015.
668 Arai – Takahashi (n 19) 2.
669 *A and Others v United Kingdom* [2009] ECHR 301, para 184.
670 R Macdonald, 'The Margin of Appreciation' in Ronald Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 123.
671 Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 Eu Const Law Rev 173, 180.

human rights is 'complementary but subsidiary' to those existing in national systems.[672]

The margin of appreciation doctrine is not legally defined in the text of the Convention, although the Protocol No 15 to the ECHR[673] (not yet in force) refers to it, and a great many scholars have attempted to define its nature.[674] Sir Humphrey Waldock, former British Judge at the ECtHR, has shared his understanding of the doctrine as 'one of the most important safeguards developed by the Commission and the Court to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy'.[675] Paul Mahoney, current British Judge in Strasbourg, referred to the margin of appreciation as 'the natural product of the distribution of power between national authorities and the Strasbourg Court'.[676] Steven Greer compared the margin of appreciation with the 'room for manoeuvre' which national authorities have,[677] and Howard Charles Yourow has defined the doctrine as an 'error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention'.[678]

Given this lack of unanimity on the essence of the doctrine, it is difficult to describe how it works, but some indication can be drawn from the Commission and from the ECtHR case law.[679] The idea of the margin of appreciation stems from *Greece v United Kingdom*[680] in 1958, in which the appropriateness of application of Article 15 of the Convention was contested. The case raised the question of whether the Commission was competent to determine the presence of an existential threat, and the scope of derogation by the state from its Convention obligations. The respondent Government was granted a 'certain measure of discretion in assessing the extent strictly required by the exigencies of the situation'.[681]

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672 Arai-Takahashi (n 19) 3.
673 Protocol No 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms (adopted on 16 May 2013, opened for signature on 24 June 2013) CETS No 15.
674 For the major but not exhaustive list of the literature on this issue see Yutaka Arai -Takahashi (n 18) 1.
675 Humphrey Waldock, 'The Effectiveness of the System Set Up by the European Convention on Human Rights' (1980) 1 HRLJ 1, 9.
676 Paul Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 HRLJ 57, 81.
677 Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing 2000) 5.
678 Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers 1996) 13.
679 ibid 3.
680 *Greece v United Kingdom* (1958) 1 DR 181.
681 ibid [30], [176].

Known in its early years as a 'power of appreciation',[682] this doctrine has been also referred to in the jurisprudence of the ECtHR.[683] In *Lawless v Ireland*, the Strasbourg Court invoked Article 15 in respect of the applicant's claims alleging a violation of Articles 5 and 6, due to the use of preventive administrative detention by the Irish government, which had adopted those measures in response to Irish nationalist terrorist attacks that threatened the safety of the nation.[684] What is interesting about this case is that the ECtHR upheld the Government's actions without referring to the 'margin of appreciation' doctrine in its decision.[685]

The term was first used by the Strasbourg Court in *Ireland v the United Kingdom*, in which the ECtHR, having left a wide margin of appreciation to the national authorities that were 'in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it',[686] justified actions by the British government during the conflict in the Northern Ireland between 1971 and 1975, including mass arrest, detention and internment without trial. The Court held that, in the context of Article 15(1) ECHR, these were indispensable in protecting society against terrorism.[687]

The ECtHR has further extended the application of the doctrine to other types of cases going beyond the derogation clauses mentioned in Article 15.[688] To balance individual freedoms and collective interests,[689] any interference with Convention rights by a public authority should be grounded in the provisions of law, pursue a legitimate aim and be necessary in a democratic society as required by Articles 8-11 ECHR. Provided that these requirements are met, there would be no breach by the respondent state of its obligations under the Convention. This is why the measures adopted for achieving its objectives were carefully examined through the prism of proportionality, which was described by Arai Takahashi as 'the other side of the margin of appreciation'.[690]

682 *Handyside v United Kingdom* (1976) Series A 24, para 50.
683 *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v Belgium* (1968) Series A 6, para 4 subpara 4; *Case of De Wilde, Ooms and Versyp ("VAGRANCY")) v Belgium* (1971) Series A 12, para 93.
684 *Lawless v Ireland* (1961) Series A 3, paras 29, 30.
685 ibid [47].
686 *Ireland v the United Kingdom* (1978) Series A 25, para 207.
687 ibid [235].
688 Yurow (n 678) 21.
689 George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 (4) OJLS 705, 711.
690 Arai -Takahashi (n 19) 14.

In *Klass and others v Germany*,[691] dealing with the restriction of the right to privacy in the interests of the national security, the ECtHR stressed that the domestic legislation being challenged[692] that allowed the adoption of surveillance measures by national authorities without notifying the persons concerned and that did not provide remedies against those measures before the courts,[693] was necessary in a democratic society for the prevention of disorder and crime, and did not find it to be in conflict with Article 8.[694] The Court acknowledged that the national legislature enjoyed a certain discretion in organising surveillance, that did not allow, however, the adoption of disproportionate measures 'in the name of the struggle against espionage and terrorism'.[695]

A reasonable question might arise in respect of the scope of the discretion which the national authorities are permitted to exercise, and the extent to which it could limit the fundamental rights and freedoms guaranteed under the Convention. Given that the ECtHR, when determining the breadth of margin to be vested in national authorities for interpreting the Convention provisions, pays attention to such factors as the circumstances of the case, the subject-matter, the possible existence of 'common ground between the laws of the Contracting States',[696] the results may be quite broad in some cases and considerably narrower in others. Since this directly links to the degree of strictness of the external control by the Strasbourg Court, it seems sensible to examine the scope of this margin of appreciation that could be afforded to member states.

In its jurisprudence the ECtHR has referred to a 'wide margin', in *Lautsi v Italy*,[697] a 'certain margin', in *Otto-Preminger-Institut v Austria,*[698] and simply a 'margin of appreciation' without specifying further details, in *Handyside v UK*.[699]

The greatest impact of the doctrine of the margin of appreciation has been seen with respect to Article 9 of the Convention and Article 2 of Protocol No 1. *Lautsi v Italy*, in which the applicant challenged these provisions, raised the issue of compatibility of the right to freedom

691 *Klass and others v Germany* (1978) Series A 28.
692 Basic Law (n 97), art 10 para 2; Gesetz zur Beschränkung des Brief-, Post- under Fernmeldegeheimnisses of 13 August 1968 [Act on Restrictions on the Secrecy of the Mail, Post and Telecommunications] BGBl I, 949.
693 *Klass* (n 691), para 10.
694 ibid [60], [75].
695 ibid [49].
696 *Rasmussen v Denmark* (1984) Series A 87, para 40.
697 *Lautsi v Italy* [2009] ECHR 1901; *Lautsi v Italy* App no 30814/06 (GC,18 March 2011), para 61.
698 *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34, para 50.
699 *Handyside* (n 682), para 48.

of religion with the presence of religious symbols in public schools. Having observed that education should provide an 'open school environment which encourages inclusion rather than exclusion, regardless of the pupil's social background, religious beliefs or ethnic origins' and that schools should not be 'the arena for missionary activities or preaching',[700] the ECtHR held that such practice of displaying religious symbols in classrooms was a breach of the Convention and required the respondent state to preserve confessional neutrality because school attendance was compulsory regardless of religion.[701]

In 2010 the Italian government appealed to the Grand Chamber, which delivered its decision on 18 March 2011. Observing the absence of a European consensus on the presence of religious symbols in public schools, it held that the state has been allowed a 'wide margin of appreciation' to ensure religious pluralism.[702] Since religious symbolism was an integral part of the state's identity, contracting parties were allowed to decide on their own what significance to confer on it and what practical implications this would entail.[703] In viewing the presence of the crucifix as a passive religious symbol rather than forced participation in religious activities,[704] the Grand Chamber allowed the appeal, concluding that the respondent state had not transgressed the limits of the margin of appreciation in complying with its obligations under the Convention.[705]

The need to balance conflicting rights, particularly the right to freedom of expression (Article 10 ECHR) and freedom of religion (Article 9), was addressed in *Otto-Preminger-Institut v Austria*, which concerned the issue of blasphemy. The Otto-Preminger-Institut, a private association promoting entertainment through audio-visual media, claimed that seizure and subsequent forfeiture of the film *Das Liebeskonzil* amounted to a violation of Article 10.[706] The ECtHR, observing there was no 'uniform conception of the significance of religion in society' across Europe, granted member states a 'certain margin of appreciation' for defining the extent of interference with the right to freedom of expression which is 'directed against the religious feelings of others'.[707]

700 *Lautsi* (2009), (n 697), para 47 c.
701 ibid [56], [58].
702 *Lautsi* (GC 2011), (n 697), para 61, 70.
703 ibid [47].
704 ibid [72].
705 ibid [76], [74].
706 *Otto-Preminger-Institut* (n 698), paras 42, 52.
707 ibid [50].

In *Handyside v United Kingdom* the owner of the publishing firm alleged a violation of Article 10 having been fined for publishing the book *The Little Red Schoolbook* containing information on sexual matters for adolescents which was considered offensive by the UK authorities.[708] The ECtHR, having pointed to the absence in the domestic law of other contracting states of a 'uniform European conception of morals',[709] concluded that even if the seizure of the copies of the book pursued a legitimate aim and was prescribed by law the respondent state enjoyed a 'margin of appreciation' in determining the extent to which the protection of morals in that society required the adoption of particular measures.[710]

This lack of clarity and consistency in the application of the doctrine quite often provoked conflict situations between the Strasbourg Court and the contracting parties to the Convention. One would argue that in those cases where the respondent state was granted a margin of appreciation, the ECtHR's intrusion into the states' affairs was more reserved, but this is unfortunately not the case. Given that the 'domestic margin of appreciation goes hand in hand with a European supervision',[711] the ECtHR remains an exclusive supervisory institution empowered to determine whether national authorities have acted within the prescribed limits[712] or have overstepped them.[713] Kratochvil has argued that a state's discretion does not facilitate the resolution of disputes as the Strasbourg Court conducts its own analysis[714] to verify whether, as in *Gorzelik and Others v Poland*, the decisions of national authorities are proportionate to the legitimate aim pursued and the reasons presented for justifying them are sufficient.[715] He observed that, including in those cases[716] where the ECtHR did not explicitly refer to this doctrine when adjudicating the cases, it provided the proportionality analysis.[717]

According to Steven Greer, the ECtHR has not been consistent in applying this doctrine, due to its 'casuistic, uneven, and largely unpredictable nature'.[718] Possible tensions between the ECtHR and the contracting parties could be avoided if the consequences of invoking the

708 *Handyside* (n 682), paras 14, 18.
709 ibid [49].
710 ibid [47]-[48], [52].
711 ibid [49].
712 *Janowski v Poland* (1999) 29 EHRR 705, para 35.
713 *Van Kück v Germany* (2003) 37 EHRR 973, paras 84-85.
714 Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the ECtHR' (2011) 29(3) Netherlands Q Human Rights 324, 337, 339.
715 *Gorzelik and Others v Poland* [2004] ECHR 72, para 96.
716 *Sidabras and Džiautas* v *Lithuania* App nos 55480/00 and 59330/00 (ECtHR, 27 July 2004).
717 Kratochvil (n 714) 355.
718 Greer (n 677) 5.

margin of appreciation and the depth of the ECtHR's subsequent scrutiny were understood,[719] for instance, the Strasbourg Court has on several occasions linked 'a more extensive European supervision […] to a less discretionary power of appreciation'.[720] It is thus important, as proposed by Eva Brems, to control the use of this doctrine, which has been compared by Jeffrey Branch to a 'black box',[721] in order to prevent 'any arbitrariness and uncertainty' in the application of the Convention standards,[722] and not jeopardise the core of the rule of law principle.[723]

2.4.2 Search for a European consensus

The Strasbourg Court, when applying the margin of appreciation doctrine, has sought uniform standards of interpretation of the Convention rights among contracting states to guide its assessment of whether disputed measures are proportionate to the objectives pursued. This search remains difficult because of a lack of regulation. Even though the term 'European consensus' has not been legally defined, the ECtHR has suggested that it should be read in light of the ECHR as 'the basis for the evolution of conventional standards through the case-law of the ECtHR'.[724] This originates from *Tyrer v United Kingdom*, in which the ECtHR for the first time made a reference to 'the commonly-accepted standards in the penal policy of the member states of the CoE'.[725]

As a 'mediator between the dynamic interpretation and the margin of appreciation',[726] this European consensus, according to Kanstantsin Dzehtsiarou, seeks to strengthen legitimacy 'through ensuring the Court's subsidiary function and preventing unacceptable judicial

719 ibid 344.
720 *Sunday Times v the United Kingdom* (1979) Series A 30, para 59; *Obukhova v Russia* App no 34736/03 (ECtHR, 8 January 2009), para 22.
721 Jeffrey A Brauch, 'The Margin of Appreciation and the Jurisprudence of the ECtHR: Threat to the Rule of Law' (2005) 11 Columbia J Eur L 113, 133.
722 Eva Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the ECtHR' (1996) 56 ZaöRV 240, 313.
723 Brauch (n 721) 115.
724 Anatoly Kovler, Vladimir Zagrebelsky, Lech Garlicki, Dean Spielmann, Renate Jaeger and Roderick Liddell, 'The role of the Consensus in the System of ECHR' in Dialogue Between Judges (Discussion Paper 2008) 12.
725 *Tyrer v United Kingdom* (1978) Series A 26, para 31 subpara 2.
726 Alexander H. E Morawa, 'The 'Common European Approach', 'International Trends', and the Evolution of Human Rights Law. A Comment on Goodwin and I v. The United Kingdom' (2002) 3(8) German LJ cited in Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge UP 2015) 23.

activism'.[727] Analysis of the case law of the ECtHR has shown that the Court in an attempt to reveal the emergence of common standards among the states referred not only to the comparative analysis of their practices, but also to a wide range of other sources such as international law,[728] EU law,[729] case law of the CJEU,[730] CoE documents,[731] the legislation of European and non-European-states[732] and expert analysis.[733]

Despite making explicit use of these tools in its judicial practice, the Strasbourg Court did not disclose, however, the extent to which they should be taken into account in examining the existence or absence of common standards. Laurence Helfer expressed concerns[734] over the coherence in applying by the ECtHR these 'specialised international instruments'.[735] Since this might damage the credibility of this judicial mechanism for the protection of human rights,[736] Monika Ambrus has drawn attention to the importance of adopting a more transparent approach to defining the conditions for carrying out such comparison, particularly in terms of occurrence, thoroughness and interpretation of results.[737] She argued that, when looking for a European consensus, the Strasbourg Court was not consistent in applying a comparative law method.[738]

Former Austrian Judge at the ECtHR, Franz Matscher, in his dissenting opinion in *Öztürk v Federal Republic of Germany*, claimed that conducted in the case comparative analysis should have been 'of a far more detailed nature than those carried out so far by the Convention institutions'.[739] The lack of a systematic approach to the process of determining the scope of the Convention rights has also been criticised by Paolo Carozza, who stressed that it is unacceptable to simply arrive at a conclusion on the presence or absence of a consensus.[740] As an example he cited *Rasmussen v Denmark*, in which the ECtHR stated that 'the contracting

727 Dzehtsiarou (n 726) 3.
728 *Markin GC* (n 578), paras 49-54.
729 ibid [63]-[64].
730 ibid [65]-[70].
731 ibid [55]-[62]; *Sahin v Turkey* [2005] ECHR 2005-XI, paras 66-69.
732 *Markin GC* (n 578), paras 71-75; *Sahin* (n 731), paras 55-65; *Goodwin* (n 278), para 84.
733 *Stoll v Switzerland* [2007] ECHR 2007-V, paras 44, 107.
734 Laurence R Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 Cornell Intl LJ 133, 139.
735 *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011), para 102; *Demir and Baykara v Turkey* [2008] ECHR 2008, para 85.
736 Helfer (n 734) 140.
737 Ambrus (n 54) 367.
738 ibid 368.
739 *Öztürk v Federal Republic of Germany* (1984) Series A 73, Dissenting Opinion of Judge Matscher, s A2.
740 Paolo G Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the ECtHR' (1998) 73(5) Notre Dame L Rev 1217, 1225.

states' legislation regarding paternity proceedings shows that there is no such common grounds and that in most of them the position of the mother and that of the husband are regulated in different ways'.[741] It failed to specify the number of states surveyed, by whom, and the sources used. Given that the scope of the margin of appreciation will be determined, including on the basis of the results of this comparison, it is important to ensure that it was not 'casual, superficial, and incomplete'.[742]

As this could weaken the legitimacy of the ECtHR's judgments, Monika Ambrus proposed to encourage the Court to make its arguments more explicit[743] and to interpret the obtained results in a logical and consistent manner to exclude any controversial reading of fundamental rights norms, while keeping up with the dynamic reality. This was also underlined by the Strasbourg Court itself in *Tyrer*, where the Convention was said to be a 'living instrument which must be interpreted in the light of present-day conditions'.[744] The use of evolving interpretation leads to a more extensive comparative analysis which may assist the ECtHR in its endeavours in this area. Since the ECtHR when interpreting the Convention, relies on 'subsequent - domestic and international, state and social – practice', which, as argued by Georg Nolte, 'gives it the possibility […] to openly change its own jurisprudence',[745] this study will explore that concern, using a series of cases concerning the legal status of transsexuals.

In the 1986 case of *Rees v United Kingdom* the Strasbourg Court found that, at that time, there was little common ground among contracting states on the status of transsexuals. [746] It returned to the issue in 1990 in *Cossey v United Kingdom*, and found no improvement, but acknowledged that the legal rules were in a transitional stage, and granted the state a wide margin of appreciation in this area.[747] In a joint dissenting opinion, Judges Macdonald and Spielmann, disagreed, however, with the conclusion of the ECtHR that there have been only 'certain developments since 1986 in the law of some of the member states of the Council of Europe',[748] arguing that there were 'clear developments' in the recognition of the post-

741 *Rasmussen* (n 775), para 41; *Sahin v Turkey* (n 658), para 55.
742 Carozza (n 740) 1224.
743 Ambrus (n 54) 369.
744 *Tyrer* (n 725), para 31.
745 Georg Nolte, Second Report for the ILC Study Group on Treaties over Time 'Jurisprudence Under Special Regimes Relating to Subsequent Agreements and Subsequent Practice' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 262-263, 268.
746 *Rees v United Kingdom* (1986) Series A 106, para 37.
747 *Cossey v United Kingdom* (1990) Series A 184, para 40.
748 ibid, para 40 subpara 3.

operative gender status.[749]

In the 1998 case of *Sheffield and Horsham v United Kingdom*[750] the Strasbourg Court did not find 'any common European approach' to the issue, but in the 2002 case of *Christian Goodwin v United Kingdom* the ECtHR confirmed that in light of significant, although by no means uniform, developments since its last ruling of the 'increased social acceptance of transsexuals' it decided to keep up with the 'international trend in favour […] of legal recognition of the new sexual identity of post-operative transsexuals'. [751] Thus, by accentuating the necessity to attach considerable attention 'to the changing conditions within the respondent state and within contracting states generally and respond, for example, to any evolving convergence as to standards to be achieved', the ECtHR reaffirmed its adherence to practical and effective interpretation of the Convention.[752]

Given that the process of seeking the European consensus is still obscure and lacks methodological precision and transparency,[753] this might lead to divergent interpretation of the results of the comparative analysis. The legitimacy of this concept has been widely discussed in the legal literature.[754] Howard Yourow has commented that there was little rationality in the application of this judicial technique by the Strasbourg Court as the 'contours of the consensus analysis are too vague, the substantive content of the doctrine is too elusive and it can be invoked to reach both pro-rights and pro-state holdings without the benefit of developing substantive doctrinal consistency'.[755]

Setting standards for the Convention rights based on the ECtHR's monitoring of the common trends among member states would not guarantee the rights of those whose interests were not embraced by the European consensus, thus weakening the protection afforded them. Konstantion Dzehtsiarou has opined that depending on the establishment of common standards among states[756] may not be the best means of development of fundamental rights, given their historical, political, cultural differences and divergent approaches to the

749 ibid, Joint Partly Dissenting Opinion of Judges Macdonald and Spielmann, para 2.
750 *Sheffield and Horsham v United Kingdom* [1998] ECHR 1998-V, paras 57, 58.
751 *Goodwin* (n 278), para 85.
752 ibid [74].
753 Daniel Regan, ''European Consensus': A Worthy Endeavour For the European Court Of Human Rights?' (2011) 14 Trinity College L Rev 51, 55.
754 ibid 58; Dzehtsiarou (n 726) 130.
755 Howard Charles Yourow, 'The Margin of Appreciation Doctrine in the Dynamic of European Human Rights Jurisprudence' (1987) 3 Connecticut JIL 111, 152.
756 Dzehtsiarou (n 726) 116.

understanding of the scope of the Convention rights. Daniel Regan believes that the Strasbourg Court should abandon further use of the European consensus concept, emphasising that it was not the most relevant instrument for defining the content of fundamental rights and freedoms under the ECHR.[757] This is why he argued for use of comparative law by the ECtHR to determine the general principles common to the law of contracting states that would make it possible to achieve an autonomous interpretation of the fundamental rights by the Court.[758]

As the remaining gaps leave substantial space for the Strasbourg Court's discretion, only if a uniform approach to the application of European consensus in the ECtHR's practice is adopted, it would attract wide support and make a significant contribution to establishing greater consistency and predictability. Given that the application in the practice of the Strasbourg Court of analysed judicial techniques is crucial for sustaining a balance between the subsidiary nature of the ECHR protection mechanism and the protection of fundamental rights by member states, the Strasbourg Court would be required to address discussed uncertainties shortly in order to avoid being accused of the arbitrary exercise of power.

2.5 Chapter summary

This chapter has examined the challenges that the contracting parties to the Convention face in the reception of the ECHR and in the implementation of the ECtHR's judgments in their legal systems. The analysis showed that the Convention has the same legal status as other federal laws in the hierarchy of their domestic legal sources, while being subordinate to their constitutions. It has been observed that despite divergent legal traditions, attitudes of national authorities to international treaty obligations and political dynamics in the legal orders of the member states, there is a growing tendency among the national courts to take into account the interpretation of the Convention by the ECtHR.

However, the chapter has also discussed that the contracting parties to the Convention, when incorporating this international treaty in their legal systems, did not pay much attention to constitutional issues, which eventually led to confrontation between the ECtHR and the courts of the ECHR member states, particularly the FCC and the RCC, in their resolution of disputes on fundamental rights. A number of recommendations has been made to improve the

757 Regan (n 753) 75.
758 ibid 69, 76.

cooperation between the courts and reduce the risk of new jurisdictional contradictions. It has been argued that to avoid situations, in which judgments by these judicial institutions may run counter to each other, the ECtHR would be expected to recognise the primary role of the member states in guaranteeing the rights under the Convention, and the national courts, in turn, as the 'natural judges of international law'[759] would be required to achieve coherent approaches to the understanding of the Convention provisions and rely not only on the case law of the Strasbourg Court, which provides interpretations that 'should be highly persuasive for domestic courts empowered to apply international law and/ or seeking ensure that the state complies with its international obligations', but also on the decisions of domestic courts of other states to determine whether there exists 'any subsequent practice indicating the agreement of states parties as to interpretation'.[760]

The chapter addressed controversial issues related to the application of the margin of appreciation doctrine and the European consensus concept in the ECtHR's jurisprudence. It accentuated that, due to remaining uncertainties in the use of these judicial techniques when defining the scope of the discretion to be granted to member states, the Strasbourg Court should accommodate the concerns about their legitimacy in order not to subject to doubts the accuracy of its judgments.

The observations in this chapter showed that the contracting parties to the Convention, having recognised the fundamental importance of the European system for the protection of fundamental rights, were ready to seek lawful solutions to occurring in cooperation between the Strasbourg Court and their domestic courts conflicts for the sake of maintaining a well-functioning system. However, they reserved the right to determine the extent to which the treaty obligations will be complied with. Given that, as discussed in the chapter, the exercise by the RCC of its recently acquired authority to rule on the enforcement of the ECtHR's judgments might not only jeopardise the domestic implementation, but question further participation of the state in the Convention, it appears quite likely that new tensions between the courts will emerge in the future, particularly as the ECtHR in departing from its primary mission to adjudicate individual cases has shifted its focus to a more abstract review of the Convention provisions by identifying the structural problems in the national legal orders of the member states, which the following chapter will analyse in detail.

759 Antonious Tzanakopoulos, 'Domestic Courts as the ''Natural Judge'' of International Law: A Change in Physiognomy' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (Hart Publishing 2011) 155.

760 Tzanakopoulos (n 53) 75, 94.

CHAPTER III

CHALLENGES OF THE PILOT JUDGMENT PROCEDURE

3.1 Introduction

This chapter discusses the process of constitutionalisation of the ECtHR, the legitimacy of its recently developed pilot judgment procedure, and reflects on the changes that have occurred in the national legal systems of Poland, Germany and Russia with respect to rendered by the ECtHR pilot judgments. By analysing *Broniowski v Poland*, *Rumpf v Germany* and *Burdov v Russia (no 2)*, it will show how the challenges in the implementation of these pilot judgments by member states hamper effective cooperation between the ECtHR and the national judiciary.

It argues that further application of the pilot judgment procedure, which was intended to reduce the ECtHR's caseload, might weaken the position of individuals seeking access to the ECtHR and threaten the sovereignty of the states. The chapter focuses on the importance of improving the enforcement of the Strasbourg Court's judgments among the contracting parties to the Convention, and developing a system of legal remedies capable of effectively rectifying those alleged violations of fundamental rights at the national level. It also discusses how to strengthen the effectiveness of national judicial review procedures, and provides several suggestions on how to improve the functioning of the constitutional complaint mechanism. By involving the national courts in promoting, respecting and protecting fundamental rights, most infringements would be addressed domestically, and this could considerably reduce the number of the ECtHR's pilot judgments.

3.2 Origins and legitimacy of the pilot judgment procedure

In the previous analysis of the cooperation between the courts in Europe, it has been observed that the CJEU and the ECtHR quite often exercise powers that were exclusively vested in courts authorised to perform constitutional review, due to their specific functions. It has been argued in the academic community that the CJEU has acquired a status of the 'constitutional

court of the EU legal order'.[761] To clarify this, Giulio Itzcovich referred to the concept of the constitution proposed by András Jakab, in accordance with which it possesses 'the highest rank in a legal order in the sense that the validity of all other norms is measured on them'.[762] He believed that it could be addressed to the exclusive competence of the Court of Justice in annulment proceedings brought under Article 263 TFEU[763] and in preliminary proceedings on the validity of EU law under Article 267(b) TFEU. As far as the ECtHR was concerned, it has been claimed that both the Convention, which has been referred to as 'a constitutional instrument of European public order (ordre public)',[764] and the Strasbourg Court itself 'perform functions that are comparable to those performed by national constitutions and national constitutional courts in Europe'.[765] It could be presumed that in respect of the Convention this was attributed to the status it enjoys in the legal systems of the contracting parties. As the Austrian example illustrates, after the 1964 amendments to the Austrian Constitution of 1945,[766] the ECHR acquired constitutional status, but was nevertheless incorporated into domestic law, as observed in the decision of the Austrian Constitutional Court in *Miltner*, with certain limitations. In Netherlands, pursuant to Article 94 of the Dutch Constitution,[767] all clashes between the Constitution and the ECHR must be resolved in favour of the latter. This would also mean that the rights and freedoms guaranteed by the ECHR could be directly invoked before the Dutch courts, which would prioritise them over conflicting national law, including constitutional law.[768]

As far as the ECtHR is concerned, in light of its increasing engagement in identifying the systemic problems in the legal systems of the member states and making recommendations for improving the national legislation rather than constraining itself to identifying the

761 Giulio Itzcovich, 'The European Court of Justice as a Constitutional Court. Legal Reasoning in a Comparative Perspective' (Stals Research Paper 4/ 2014) 6.

762 András Jakab, 'Judicial Reasoning in Constitutional Courts: A European Perspective' (2013) 8 German LJ 1215, 1216.

763 Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1985] ECR 4199, para 15.

764 *Loizidou* (n 408), para 75.

765 Alec Stone Sweet and Helen Keller, 'The Reception of the ECHR in National Legal Orders' in Sweet and Keller (eds), *A Europe of Rights* (n 85) 7.

766 Abänderung und Ergänzung von Bestimmungen des Bundes-Verfassungsgesetzes in der Fassung von 1929 über Staatsverträge [Amendments and Additions to Federal Constitution Act as amended in 1929 on state treaties] 6 April 1964 BGBl 210/1958, art II, subpara 7; B-VG [Federal Constitutional Law] 4 March 1969, as amended according to the provisions of the Federal Constitutional Law from 1929 concerning state treaties BGBl I No 1/1930.

767 Grondwet voor het Koninkrijk der Nederlanden [Dutch Constitution] 17 February 1983, Stb 70, English translation Netherlands Intl L Rev 1983, S 387-410; H F Panhuys, 'The Netherlands Constitution and International Law' (1953) 47 AJIL 537.

768 Gerda A Kleijkamp, *Family Life and Family Interests: A Comparative Study of the Influence of the European Convention of Human Rights on Dutch Family Law and the Influence of The United States Constitution on American Family Law* (Kluwer Law International 1999) 21.

infringements of the Convention through administration of justice in individual cases, it is, according to Wojciech Sadurski, becoming 'more constitutional now than before'.[769] This could be linked to the application of the pilot judgment procedure (PJP), a development of which was triggered by the end of the Cold War when former communist countries of Central and Eastern Europe, the political and legal systems of which were still in transition,[770] joined the CoE.[771] The standards of human rights protection in these countries did not meet the requirements stipulated by the Statute of the CoE, but they were invited to accede to the CoE quickly without bringing their legislation into line with the provisions of the Convention,[772] despite the ECtHR having ruled in *Maestri v Italy* that 'in ratifying the Convention the contracting states undertake to ensure that their domestic law is compatible with it'.[773] As a result of this rapid expansion of the CoE in the 1990s,[774] the ECtHR faced a steady flow of complaints coming from the new contracting states. Since this had a tremendous impact on its workload, there emerged a need[775] to establish an effective mechanism capable of addressing the increasing number of analogous cases at the ECtHR.[776] In response to this problem, the governments of the states, the Committee of Ministers, and the Strasbourg Court itself decided to develop cooperatively the PJP.[777]

The history of the PJP goes back to the European Ministerial Conference on Human Rights held on 3-4 November 2000 in Rome that sought to enhance the ECtHR's efficiency by adopting new mechanisms and improving domestic implementation of the Convention.[778] On account of this, the Steering Committee for Human Rights, the role of which is to increase the effectiveness of the control mechanism set up by the Convention, introduced a package of reform proposals, among which was the proposal for the PJP that was to be applied to 'clone cases'[779] to encourage respondent states to provide individuals with an efficient remedy, due

769 Sadurski (n 91) 449.
770 Wildhaber (n 90) 163.
771 Paraskeva (n 92) 1, 3; Fyrnys (n 92) 1231.
772 Peter Leuprecht, 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible With Reinforcement?' (1998) 8 Transnational Law and Contemporary Problems 313, 333.
773 *Maestri v Italy* (2004) 39 EHRR 832, para 47.
774 Paraskeva (n 92) 3.
775 Helen Keller, Andreas Fischer and Daniela Kühne, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals' (2010) 21(4) EJIL 1025, 1034.
776 Paraskeva (n 92) 4.
777 Oana Nedelcu-Surdescu, 'Brief Analysis of the Operation of the Pilot Judgment Procedure Before the European Court of Human Rights (ECHR)' (2011) I (1) RSERI 24, 25.
778 CoE, 'Proceedings of the European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th Anniversary of the European Convention on Human Rights' 3-4 November 2000 <http://www.coe.int/t/dghl/standardsetting/cddh/Proceedings/Rome_en.pdf> accessed 17 November 2014
779 CDDH, Guaranteeing the long-term effectiveness of the European Court of Human Rights. Final report containing proposals of the CDDH adopted by the CDDH on 4 April 2003, CM (2003)55, 8 April 2003; Addendum to the Final report containing CDDH proposals (long version), CDDH (2003)006 Addendum

to persistent structural problems at the national level.

In September 2003, the ECtHR presented a Position Paper which stressed the need to address the problem of identical cases at the Court that constituted a significant proportion of its workload.[780] The Strasbourg Court's concerns requiring the amendment of the Convention to provide a legal basis for future application of the PJP were rejected by the Steering Committee, which asserted that, as the procedure was still evolving, it could be applied by reference to the existing text of the Convention.[781]

At the meeting of the Committee of Ministers in May 2004 several instruments for increasing the efficiency of the ECtHR were introduced:[782] the Committee adopted the Recommendation on improvement of domestic remedies,[783] which invited states to guarantee effective legal remedies in national legal orders in respect of those judgments of the ECtHR that identified structural problems; approved the Resolution on judgments revealing an underlying systemic problems,[784] which called on the ECtHR to determine 'what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments'; and also adopted Protocol No 14 amending the control system of the Convention and establishing the filtering mechanism to cover systematic cases, that, unfortunately, has neither provided the legal framework for the operation of the PJP nor has been ratified by the Russian Duma.[785]

In its Report to the Committee of Ministers, the Group of Wise Persons, which had been set up in 2005 to ensure the long-term effectiveness of the Convention,[786] called on the ECtHR to

Final, 9 April 2003, 25.

780 ECtHR, Position Paper on proposals for reform of the European Convention on Human Rights and other measures as set out in the report of the Steering Committee for Human Rights of 4 April 2003, CDDH-GDR (2003)024, 12 September 2003.

781 CDDH, Interim Activity Report: Guaranteeing the long-term effectiveness of the European Court of Human Rights – Implementation of the declaration (adopted by the Committee of Ministers at its 112th session 14-15 May 2003), CDDH(2003)026, 26 November 2003, paras 20-21.

782 Adopted at the conference documents are available at <https://wcd.coe.int/ViewDoc.jsp?id=143001&Site=CM> accessed 15 July 2015.

783 CM, Rec (2004) 6, 12 May 2004.

784 CM, Res (2004) 3, 12 May 2004.

785 Grani Global, 'Gosduma Otkazalas Ratificirovat Protokol o Reforme Strasburgskogo Suda' [The State Duma of the Russian Federation has Refused to Ratify the Protocol No 14] (Grani Global, 20 December 2006) <https://gr1.global.ssl.fastly.net/Politics/World/Europe/m.115992.html> accessed 29 September 2015.

786 Warsaw Declaration. Third Summit of Heads of State and Government of the Council of Europe, CM(2005)79 final, 17 May 2005, para 2.

ensure the fullest possible use of the PJP.[787] Given that it was still under development and even the term 'pilot judgment' has not been legally defined, a rational question could arise as to how legally justified those pilot judgments would be, in the absence of any clear legal basis. In such cases, the Strasbourg Court relied on Article 46(1) of the Convention, under which states that recognised the jurisdiction of the ECtHR accepted their responsibility to abide by the final judgment of the Court when it finds a violation of the Convention.[788]

At the High-level conference on the future of the ECtHR in 2010 the Secretary General of the CoE, Thorbjørn Jagland, welcomed the idea of the PJP, and proposed to codify it either in the 'Convention, or in the future Statute of the Court' to guarantee its proper application in future.[789] The Interlaken Declaration adopted at the Conference highlighted the need 'to develop clear and predictable standards for this procedure as regards selection of applications, the procedure to be followed and the treatment of adjourned cases, and to evaluate the effects of applying such and similar procedures'.[790]

On 21 February 2011, the ECtHR adopted Rule 61[791] which detailed the process of application of the PJP. It stated that, if a systemic dysfunction is found which has given rise or may give rise to similar complaints, the ECtHR could make use of it either on its own motion or at the request of one or both parties.[792] Once the applicability of the PJP is recognised, a prior processing of application chosen for rendering a pilot judgment would be given,[793] and the Court can set a time limit by which the respondent state must give effect to the recommendations made by the Court in the pilot judgment.[794] The Court could also adjourn consideration of all similar applications during that period, but reserve the right to reopen them at any time.[795] If a friendly settlement is reached by the parties, the agreement should include a declaration on the implementation of the remedial measures specified in the pilot judgment.[796]

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787 CM, Report of the Group of Wise Persons to the Committee of Ministers, CM (2006) 203, 15 November 2006.
788 *Broniowski* (n 42), para 192.
789 SG of the CoE, Contribution of the Secretary General of the Council of Europe to the preparation of the Interlaken Ministerial Conference, SG/Inf (2009)20, 18 December 2009, para 20.
790 Interlaken Declaration (2010) High level Conference on the Future of the European Court of Human Rights (adopted on 19 February 2010), para 7b.
791 Rules of Court, Rule 61 inserted by the Court on 21 February 2011 <www.echr.coe.int/Documents/Rules_Court_ENG.pdf> accessed 17 November 2014.
792 ibid, art 1.
793 ibid, art 2.
794 ibid, arts 3-4.
795 ibid, art 6.
796 ibid, art 7.

By inducing member states to end systematic violations of human rights and encouraging legislative changes in their legal systems, the ECtHR might be accused of exceeding the limits of the powers entrusted to it failing to respect the sovereignty of the contracting parties, as the states no longer remain free to choose their own ways of complying with the obligations under the Convention.[797] According to former Registrar of the Court, Erick Fribergh, the Strasbourg Court has been given a more political role in this procedure.[798] Gustavo Zagrebelsky, former Italian Judge at the Court, has also opined in a dissenting Opinion in *Hutten-Czapska v Poland* that the legitimacy of the PJP can be questioned as the Court, in providing specific suggestions to a state on how the problem could be solved, has usurped the role of the Committee of Ministers.[799]

With regard to this, Philip Leach has argued that there are still some concerns over the transparency and the effectiveness of the supervision powers of the Committee of Ministers[800] which has failed to 'exert enough pressure when supervising the execution of judgments',[801] and this explains the overwhelming number of persistent violations recognised by the ECtHR. The Strasbourg Court may thus be adopting a 'more assertive, or interventionist position'.[802]

At the Bled Roundtable in September 2009, Fribergh emphasised the need to increase the 'political weight and expertise of the Committee of Ministers', which can be seen as a 'key to eliminating repetitive cases' and ensuring a more determined approach to enforcement of the Strasbourg Court's decisions.[803] The Secretary General of the CoE has underlined that the current ECHR monitoring system requires reforming, which is why Thorbjørn Jagland has urged the Committee of Ministers to revise the working methods concerning its supervisory authority.[804]

These changes in the nature of the competences of the Strasbourg Court might signal its deeper constitutionalisation, and so its primary mission to administer justice in individual

797 Guggisberg (n 93) 101.
798 Erik Fribergh, 'Bringing Rights Home, or How to Deal With Repetitive Applications In the Future' (Speech delivered at a Roundtable, Bled 2009), para 37.
799 *Hutten-Czapska v Poland* (GC) [2006] ECHR 2006-VIII, Partly Dissenting Opinion of Judge Zagrebelsky.
800 Philip Leach, 'Opinion: On Reform of the European Court of Human Rights' (2009) 6 EHRLR 725, 732.
801 PACE, Resolution on the execution of judgments of the European Court of Human Rights, Res 1226(2000) 28 September 2000, para 6.
802 Leach and others (n 92)176.
803 Fribergh (n 798).
804 SG 'Contribution' (n 789), para 38.

cases is called into question. Former Slovenian Judge at the ECtHR, Boštjan Zupančič, stated that the constitutional role of the ECtHR, which entails strategically focused case resolution,[805] could not be compared to that of the courts of the ECHR member states which are granted competence to strike down legal acts that contradict the Constitution.[806] Sadurski has claimed that the ECtHR is not 'fully constitutional' as it does not possess the authority to set aside domestic law that does not comply with the provisions of the Convention.[807] Since the last word in the implementation of the ECtHR's judgments lies with the authorities of the member states, the treaty-based obligation of the state under Article 46(1) ECHR to abide by the judgment of the ECtHR is merely of 'an international character'.[808] It is therefore not always possible to be certain that Convention rights are enforceable at the domestic level, due to the fact that there are only moral and political mechanisms of enforcement of the ECtHR's judgments.[809]

Effective implementation at the national level would require not only awarding appropriate compensation, but also the adoption of general measures to resolve revealed defects. Since this might present significant challenges for the respondent states,[810] it is advisable that they take the ECtHR's recommendations seriously or they risk being accused of not complying with the Convention obligations.[811] It thus seems sensible not just steadily to increase the amount of funds available to ensure that the compensation to victims is paid promptly (the case of Russia illustrates that the state has never encountered any difficulties on account of its financial responsibility),[812] but to eliminate the root cause of a problem that gives rise to consistent violations at the national level.[813] It goes without saying that it is rather more important to bring about effective changes in the legal systems of the contracting parties than

805 Greer and Wildhaber (n 91) 684.

806 *Hutten-Czapska* (n 799), Partly Concurring, Partly Dissenting Opinion of Judge Boštjan Zupančič (s 2): 'we are not and cannot be the constitutional court for the forty-six countries concerned. The fears that we shall usurp that role are not realistic'.

807 Sadurski (n 91) 448.

808 ibid.

809 ibid.

810 NGO Comments on the Groups of the Wise Persons' Interim Report, 'Future Developments of the ECtHR in the Light of the Wise Persons' Report Ensuring the Long-Term Effectiveness of the European Court of Human Righrs' (2006) in *Reforming the European Convention on Human Rights: A Work in Progress: a Compilation of Publications and Documents Relevant to the Ongoing Reform of the ECHR* (Council of Europe Publishing 2009) 271.

811 Human Rights Watch, 'World Report 2009: Russia, Events of 2008 ''Key International Actors'' (HRW 2009) 401 <www.hrw.org/sites/default/files/reports/wr2009_web.pdf> accessed 27 August 2015.

812 Human Rights Watch, 'World Report 2014: Russia, Events of 2013 ''Cooperation with the European Court of Human Rights' (HRW, 2013) 5 <https://www.hrw.org/world-report/2014/country-chapters/russia> accessed 27 August 2015.

813 Venera Abdrashitova, 'Teoretiko-Pravovie Osnovi Ispolneniya Reshenii Evropeiskogo Suda po Pravam Cheloveka' [Theoretical and Legal Grounds of Execution of the Judgments of the European Court of Human Rights] (PhD thesis, M 2008).

simply comply with compensatory duties.[814] This is why the application of the PJP which, according to former President of the ECtHR, Luzius Wildhaber, sought to 'address a problem affecting large numbers of persons through a judgment in an individual case',[815] might be valuable, otherwise the responsibility of the state under Article 46(1) of the Convention would be simply regarded as a 'tax for impunity'[816] or a 'tax for a violation of human rights'.[817]

If the use of the PJP increases in the future, the Strasbourg Court should address the concerns over its effectiveness. First of all, to assist the state authorities in identifying the existence of a problem, the Court should disclose the meaning of 'structural or systemic problem' for its further resolution as a matter of priority. Secondly, the process of selecting cases for PJP should be more thoroughly regulated. Analysis of the Court's judicial practice shows an absence of a uniform approach to choosing cases for a PJP, as no explanation as to why some cases were chosen, and others not was provided. Thirdly, since one of the elements of the PJP is the adjournment of similar cases pending before the Strasbourg Court, this may put the applicants in a vulnerable position[818] with respect to ensuring individual justice pursuant to Article 34 of the Convention. Given that in anticipation of relevant legislative changes in the contracting parties the applications may be guarded for several years, there is an obvious danger of substantial delay in resolving individual cases[819] and of greater non-enforcement of judgments as it would be unlikely to tackle long-standing structural problems in the national legal systems within the time-limit specified by the Strasbourg Court, which is not always realistic.[820] It is therefore significant that the Strasbourg Court secures the applicants' right of access to it.

Tatiana Sainati argues that the 'Court has prioritised efficiency concerns over individual rights in an effort to stay afloat amid a veritable flood of applications'.[821] Robert Harmsen has similarly stressed that the PJP ultimately defends only the Court's interests, and in so doing

814 *Sürmeli v Germany* (2006) ECHR 2006-VII, para137.
815 Wildhaber (n 92) 75.
816 Elena Borovickaya, 'Rossiya Viplachivaet Kompensacii Kak Nalog za Beznakazannost' [Russia is Paying a Compensation as a Tax for Impunity] *Otkritaya Rossiya* (Moscow, 9 September 2014) <https://openrussia.org/post/view/47/> accessed 27 August 2015.
817 ibid.
818 Philip Leach, 'Beyond the Bug River – A New Dawn For Redress Before the ECtHR' (2005) 2 EHRLR 148, 162 cited in Paraskeva (n 712) 15.
819 Leach and others (n 92) 176.
820 *Burdov (no 2)* (n 44), para 141.
821 Tatiana Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights' (2015) 56 (1) Harvard Intl LJ 147,165.

jeopardises the 'new-found centrality' of individual in the international legal order.[822] As a single case may not reveal all the twists and turns of a systematic problem, it seems reasonable to focus on the individual resolution of disputes. However, despite remaining uncertainties over the operation of the PJP, Lord Woolf, former President of the Courts of England and Wales, explicitly welcomed its use in combating systemic human rights violations in domestic legal systems concerning a large number of people.[823] The study will now explore how this procedure is being applied in the ECtHR's practice.

3.3 The impact of pilot judgments of the ECtHR on national legal systems

The majority of judgments handed down by the ECtHR between 1959 and 2015 deal with property issues, excessive delay in judicial proceedings and the right to an effective remedy,[824] and so the following pilot judgments *Broniowski v Poland*, *Rumpf v Germany* and *Burdov v Russia (no 2)* will be examined in light of their impact on the national legal systems in reference to the changes that were made therein in response to these judgments.

3.3.1 *Broniowski v Poland*

To assess the effect of the jurisprudence of the Strasbourg Court on the Polish legal system, it is important to take a closer look at the process of incorporation of the Convention. Poland's accession to the CoE in 1991 and its ratification of the Convention in 1992[825] were regarded as vital contributions to the restoration of democracy and the rule of law in Poland. Helen Keller has argued that even if Poland did not meet the statutory requirements at the time of

822 Robert Harmsen, 'The European Court of Human Rights as a 'Constitutional Court': Definitional Debates and the Dynamics of Reform' in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights* (OUP 2007) 40.

823 Lord Woolf, 'Review of the Working Methods of the European Court of Human Rights' (December 2005) 39-40<http://webcache.googleusercontent.com/search?q=cache:9YaiH96SOwwJ:www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf+&cd=1&hl=de&ct=clnk&gl=de&client=safari> accessed 17 September 2016.

824 Statistics (n 48).

825 Ustawa z dnia 2 października 1992 r o ratyfikacji Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności [Act of 2 October 1992 acknowledging the ratification of the ECHR] DzU nr 85 poz 427.

accession, its efforts to comply with European standards for the protection of fundamental rights were feasible.[826]

The 1997 Polish Constitution[827] made an important step in converging with the Convention by inserting Article 91(1) that recognised ratified international agreements as a part of domestic law.[828] Under Article 91(2) of the Constitution, if international agreement ratified on prior consent granted by statute contradicts provisions of statutes, it will have precedence over statutes. The Polish Constitutional Tribunal held that the ECHR that enjoyed a rank below the Constitution in the Polish legal system[829] could be applied directly by national courts.[830] Such a friendly approach to international law also recognised the interpretation of the Convention by the ECtHR, the jurisdiction of which was accepted in 1993.[831] According to Jacek Chlebny, even if Polish courts did not consider the case law of the Strasbourg Court as 'absolutely binding',[832] the Constitutional Tribunal, having declared that it must be taken into account in the evaluation of national regulations,[833] regularly turned to its jurisprudence.[834] The Supreme Court has also invited judiciary to apply the practice of the Strasbourg Court as a source of Polish law.[835]

However, despite positive moves towards the increasing acceptance of international law in the domestic legal system, the exact status of the ECHR and the case law of the Strasbourg Court within it is not explicitly defined and this creates considerable space for conflicts with national judiciary, and could even lead to judicial mistakes. Since 'the mistrust *vis-à-vis* the national judges is tremendous', Poland was 'one of the best clients in Strasbourg',[836] and the

826 Helen Keller, 'Reception of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in Poland and Switzerland' (2005) 65 ZaöRV 283, 286-288.

827 Konstytucja Rzeczypospolitej Polskie [Constitution of the Republic of Poland] 2 April 1997, DzU nr 78 poz 483, available in English at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> accessed 15 August 2015.

828 Wladyslaw Czaplinski, 'Relationship Between International Law and Polish Municipal Law in the Light of the 1997 Constitution and of the Jurisprudence' (1998) 31 Revue Belge Droit Intl 259, 271.

829 Jacek Chlebny, 'How a National Judge Implements Judgments of the Strasbourg Court' in Anja Seibert-Fohr, Mark E. Villiger (eds), *Judgments of the European Court of Human Rights – Effects and Implementation* (Nomos 2014) 237.

830 TK, 2003.03.05, K 7/01; 2001.11.08, P 6/01; 1999.09.14, K 14/98; 1999.09.06, K 11/98; 1998.09.06, K 28/97; 2002.09.06, P 4/01; 2003.09.06, SK 12/03; 2004.02.03, SK 53/03 cited in Martinico (n 24) 105.

831 Constitution of the Republic of Poland (n 827), art 9 'The Republic of Poland shall respect international law binding upon it'.

832 Chlebny (n 937) 240.

833 TK, 18.10.2004, P 8/04 cited in Martinico (n 24) 105.

834 See, eg, TK, 2002.07.09, P 4/01, OTK-A 2002/4/52; 2003.03.05, K 7/01, OTK-A 2003/3/19; 2001.11.08, P 6/01, OTK 2001/8/248; Resolution, 2000.07.11, K 28/99, OTK 2000/5/150; 1999.09.14, K 14/98, OTK 1999/6/115; 1999.06.14, K 11/98, OTK 1999/5/97; 1998.06.09, K 28/97, OTK/1998/4/50; 1997.04.08, K 14/96, OTK 1997/2/16; 2000.11.15, P 12/99, OTK 2000/7/260; 1999.01.27, K 1/98, OTK 1999/1/3 cases dealing with Article 6(1) and 8 ECHR.

835 Supreme Court, 1995.01.11, III ARN 75/94, OSN ZbU 1995/9, poz 106.

836 Discussion following the presentation by Christian Tomuschat in Wolfrum and Deutsch (eds) (n 17) 23.

Convention control mechanism was perceived as a 'regular means of seeking a popular justice' and verifying the legitimacy of Polish public authority.[837] This has been particularly observed when the state did not manage to address the persistent problem of excessively long proceedings caused by dysfunctional domestic legislation and judicial system.[838]

The first pilot judgment, which was delivered by the ECtHR in 2004 in *Broniowski v Poland*, concerned the failure of Poland to pay compensation to people in the part of eastern Poland that became part of the Ukrainian Soviet Socialist Republic after World War II,[839] who had to abandon their property in the 'territories beyond the Bug River'.[840] Under Article 3 of the Agreement between the Polish Committee of National Liberation and the Government of the Ukrainian Soviet Socialist Republic on the repatriation of Poles from Ukraine and of Ukrainians from Poland,[841] Poland acknowledged its obligation to provide compensation to more than 1.2 million people between 1944 and 1953.[842] Under the Polish legislation, they had the right to receive a compensation for loss of their property until 1994,[843] but this was discontinued with the entry into force of the Law of 29 December 1993 'On amendments to the Law 'On the administration of the state treasury's agricultural property' and to other statutes'.[844] Over the next few years the Polish authorities proved reluctant to deal with the problem of granting compensation for properties beyond the Bug River.[845]

Despite the fact that some compensation that formed only an insignificant part of the whole value of the property belonging to the applicant's grandmother was made, Broniowski applied to the European Commission of Human Rights in 1996; two years later, when Protocol No 11 to the Convention entered into force, the application was transferred to the ECtHR. The

837 Magda Krzyżanowska-Mierzewska, 'The Reception Process in Poland and Slovakia' in Sweet and Keller (eds), *A Europe of Rights* (n 85) 573-574.

838 Statistics (n 48); for illustration of these problems, see *Brudnicka v Poland* App no 54723/00 (ECtHR, 3 March 2005) and *Kreuz v Poland* [2001] ECHR 2001-VI.

839 Nichtangriffsvertrag zwischen Deutschland und der Union der Sozialistischen Sowjetrepubliken [Treaty of Non-Aggression Between Germany and the Union of Soviet Socialist Republics] 23 August 1939, RGBl II, 968.

840 *Broniowsk*i (n 42), paras 10-11.

841 Układ Między Polskim Komitetem Wyzwolenia Narodowego a Rządem Ukraińskiej Socjalistycznej Republiki Radzieckiej y Sprawie Przesiedlenia Ludności Ukraińskiej z Terytorium Polski do USRR i Obywateli Polskich z Terytorium USRR do Polski' 9 September 1944, art 3 cited in *Broniowski* (n 42), para 40.

842 *Broniowski* (n 42), paras 11-12, 40, 160.

843 ibid [42]-[48].

844 Ustawa o Zmianie Ustawy o Gospodarowaniu Nieruchomościami Rolnymi Skarbu Państwa Oraz o Zmianie Niektórych Ustaw, 29 December 1993 cited in *Broniowski* (n 42), para 54; Ustawa o Gospodarowaniu Nieruchomościami Rolnymi Skarbu Państwa [Law on the Administration of the State Treasury's Agricultural Property] 19 October 1991 cited in *Broniowski* (n 42), para 54.

845 *Broniowski* (n 42), paras 22-24, 54.

Strasbourg Court pointed out that there were 167 similar complaints pending, 80,000 people remained uncompensated and the number of new claims continued to increase.[846] The ECtHR, having stressed that this represented a 'threat to the future effectiveness of the Convention machinery', found a violation of Article 1 of Protocol No 1 resulting from 'malfunctioning of Polish legislation and administrative practice'.[847] Due to the systematic nature of the problem, the Court considered it necessary to assist the respondent state in resolving the dysfunction by indicating that it must 'primarily, either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found, in respect of the applicant, to have been in breach of the Convention, or provide equivalent redress in lieu'.[848] Since it would require the national authorities to take legislative and administrative measures to ensure that the conventional right to property of remaining Bug River claimants was guaranteed, the ECtHR decided to adjourn examination of the identical applications for as long as the appropriate general measures were adopted.[849]

In December 2004, the Polish Constitutional Tribunal, having taken into account the Strasbourg Court's judgment in *Broniowski*, confirmed that the challenged provisions of the Law 'On offsetting the value of property abandoned beyond the present borders of the Polish state against the price of state property or the fee for the right of perpetual use'[850] contravened the Polish Constitution.[851] On 5 July 2005, the Committee of Ministers adopted an Interim Resolution urging the Polish authorities to improve the entitlement plan regarding the claimants and to finish the legislative reform that has already been started.[852] The new Law 'On realisation of the right to compensation for property left beyond the present borders of the Polish state' that was enacted on 8 July 2005[853] reflected those concerns expressed by the ECtHR and the Polish Constitutional Tribunal and provided an extensive set of measures to be applied in respect of the claimants.[854]

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846 ibid [193].
847 ibid [189], [187], [193].
848 ibid [192], [194].
849 ibid [198].
850 Ustawa o Zaliczaniu na Poczet Ceny Sprzedaży Albo Opłat z Tytułu Użytkowania Wieczystego Nieruchomości Skarbu Państwa Wartości Nieruchomości Pozostawionych Poza Obecnymi Granicami Państwa Polskiego, 12 December 2003 cited in *Broniowski* (n 42), para 37.
851 The Constitutional Court's Decision 15 December 2004 cited in *Broniowski v Poland* (GC Friendly Settlement) [2005] ECHR 2005-IX, paras 14-17.
852 CM, Interim Resolution Concerning the Judgment of the European Court of Human Rights of 22 June 2004 (GC) in the case of Broniowski Against Poland, ResDH(2005)585, 5 July 2005.
853 Ustawa o Realizacji Prawa do Rekompensaty z Tytułu Pozostawienia Nieruchomości Poza Obecnymi Granicami Rzeczypospolitej Polskie [On realisation of the right to compensation for property left beyond the present borders of the Polish state] 8 July 2005, DzU nr 169 poz 1418.
854 Report, Ministry of Treasury of the Republic of Poland, Round table Property Restitution/ Compensation: General Measures to Comply With The European Court's Judgments. Polish Experience In the

Following the year, in which the pilot judgment was rendered, the Polish government requested the Registrar to assist the parties in their negotiations to reach a friendly settlement that was eventually agreed in September 2005.[855] As one might observe, the framework of the agreement went beyond the scope of the individual case insofar as strong emphasis was placed on securing future effective implementation of the new legislation. The Strasbourg Court attached close attention to the implementation of general measures necessary for addressing structural problem identified in the pilot judgment and redressing the damages caused by previous defective operation of the Bug River legislative scheme.[856]

According to the information provided by the Polish Treasury in 2009, more than 19,000 claimants benefited from the 2005 law.[857] On account of this, the ECtHR, having held in the subsequent case of *Wolkenberg and Others v Poland* that the measures adopted by Poland were satisfactory,[858] struck the case from its list to close the first ever PJP.[859]

However, since more about 50,000 applications were awaiting confirmation of entitlement, it could be assumed that the Polish officials had not managed to secure the 'effective and expeditious' functioning of the compensation scheme or introduce a comprehensive set of measures necessary for complying with the recommendations of the Strasbourg Court for the implementation of the pilot judgment in *Broniowski.*[860] Thus, due to remaining complex of systematic problems at the domestic legal order, which the state authorities still fail to address, the ECtHR will continue to apply the PJP in respect of Poland, and the ECtHR's recent pilot judgment of 2015 in *Rutkowski and Others v Poland*[861] highlighted that the problem of lengthy proceedings and the need to provide redress for the damage caused by such delays remained.

Implementation of the European Court of Human Rights Judgments on Restitution of Property (Conference Materials, 17 February 2011).

855 *Broniowski v Poland [GC]* (Friendly Settlement) (n 966) [39]-[42].

856 ibid [40].

857 CM, Final Resolution on execution of the judgments of the European Court of Human Rights Broniowski v Poland (App no 31443/96, Judgment of 22 June 2004-Grand Chamber and Judgment of 28 September 2005-Friendly Settlement, Article 41), CM/ResDH(2009)89, 30 September 2009.

858 *Wolkenberg and Others v Poland* App no 50003/99 (ECtHR, 4 December 2007), paras 67, 69, 74.

859 ECtHR, Press release N 691 'First ''Pilot Judgment'' Procedure Brought to a Successful Conclusion Bug River Cases Closed' (6 October 2008) September 2016.

860 *Wolkenberg* (n 858), para 69.

861 *Rutkowski and Others v Poland* [2015] ECHR 662.

Given that the ECHR and the jurisprudence of the ECtHR have not yet been fully incorporated into the legal system of Poland, and the national authorities are not taking their obligations under the Convention seriously, this will cause a further flow of applications to the Strasbourg Court. Wladyslaw Czaplinski has opined that the rise of new abuses might be prevented if the status of international sources is precisely regulated,[862] and the best practice of countries in complying with the ECHR and comprehensively implementing the ECtHR's judgments is taken into consideration.

3.3.2 *Rumpf v Germany*

According to Sebastian Müller and Christoph Gusy, a small number of adverse judgments from the ECtHR in respect of Germany, as compared with Poland and Russia,[863] may be explained by the existence of a differentiated system of judicial review in Germany, and the constitutional complaint procedure guaranteed by the FCC.[864] Given the increasing number of individual complaints handled by the FCC every year,[865] there is no doubt about the capacity of this mechanism to eliminate infringements at the domestic level. It has been argued that the domestic court system, which is 'highly developed in terms of its expertise, accessibility and acceptance within society',[866] has contributed enormously to the protection of basic rights in Germany and has assisted in decreasing the number of applications to the ECtHR.[867] Germany has been found responsible under the Convention only in three cases in 2014[868] and in six cases in 2015,[869] and in even in those few cases the state has implemented the ECtHR's judgments timely and effectively. Its positive experience in complying with the Convention obligations should undoubtedly encourage other contracting parties to the Convention that still face certain challenges in the enforcement process.

862 Czaplinski (n 828) 271.
863 Statistics (n 48).
864 Müller and Gusy (n 30) 27-28.
865 FCC, Annual Statistics (2014) 20: 5,327 in 2012, 6,238 in 2013, 6,292 in 2014 <http://www.bundesverfassungsgericht.de/EN/Verfahren/Jahresstatistiken/2014/statistik_2014_node.html> accessed 27 July 2015.
866 Müller and Gusy (n 30) 28.
867 ECtHR, Annual Reports for years 2011, 2012, 2013, 2014 years: 2011- 3,003; 2012-2,013; 2013-502; 2014-335 <http://echr.coe.int/> accessed 19 October 2015.
868 ECtHR, Annual Report 2014 'Violations by Article and by Respondent State (2014)' 176 <http://www.echr.coe.int/Documents/Annual_report_2014_ENG.pdf> accessed 17 January 2017.
869 ECtHR, Annual Report 2015 'Violations by Article and by Respondent State (2015)' 196 <http://www.echr.coe.int/Documents/Annual_report_2015_ENG.pdf> accessed 24 January 2017.

Since the establishment of the ECtHR, a breach of the reasonable time requirement as set out in Article 6(1) of the Convention has been found in several judgments delivered against Germany, [870] among them *König v Germany*, [871] *Eckle v Germany*, [872] *Deumeland v Germany*,[873] *Süßmann v Germany*,[874] *Pammel v Germany*,[875] *Klein v Germany*,[876] *Sürmeli v Germany*, *Herbst v Germany*,[877] *Glüsen v Germany*[878] and *Kurt Müller v Germany*.[879]

In *Sürmeli v Germany*, the ECtHR found that the remedies provided by the German legal system against excessive duration of judicial proceedings did not guarantee individuals effective protection as required under the Convention.[880] Despite recognising that individuals could appeal to the FCC alleging a violation of their constitutional right to expeditious proceedings, the ECtHR pointed out that the FCC was not authorised either to establish time-limits for the lower courts, which could be objected to as unconstitutional, or to propose any alternatives to accelerate the procedure.[881] Having declared in *Sürmeli* that the problem was systematic in nature, the ECtHR has acknowledged a violation of Articles 6(1) and 13 of the Convention, due to the absence of an effective remedy that would have either speeded up the proceedings or afforded redress for delays.[882]

Germany was urged to enact a bill providing a new remedy against this excessive timescale, which would at the same time decrease the workload of the FCC.[883] It was proposed to introduce a 'complaint of inaction', to be submitted either to the court dealing with the case or to an appellate court, which could set a time-limit for adopting effective measures.[884] However, even though the ECtHR stressed the importance of introducing the legislation, it

870 *Rumpf* (n 43), para 64.
871 *König v Germany* (1978) Series A 27.
872 *Eckle v Germany* (1982) Series A 51.
873 *Deumeland v Germany* (1986) 8 EHRR 448.
874 *Süßmann v Germany* (1996) ECHR 1996-IV.
875 *Pammel v Germany* (1998) 26 EHRR 100.
876 *Klein v Germany* (2000) App no 33379/96 (ECHR, 27 July 2000).
877 *Herbst v Germany* (2007) App no 20027/02 (ECHR, 11 January 2007).
878 *Glüsen v Germany* (2008) App no 1679/03 (ECHR, 10 January 2008).
879 *Kurt Müller v Germany* App no 36395/07 (ECHR, 25 February 2010).
880 *Sürmeli* (n 814), paras 136-137.
881 ibid [105].
882 ibid [106], [116], [118].
883 ibid [138], [139].
884 Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes über die Rechtsbehelfe bei Verletzung des Rechts auf ein Zügiges Gerichtliches Verfahren (Untätigkeitsbeschwerdengesetz) [Draft Law on the Remedies for Breach of the Right to a Speedy Judicial Procedure (Inaction Complaints Act)] submitted on 22 August 2005.

still held that the German government had not made progress in improving the position of individuals in domestic judicial proceedings.[885]

Given that the number of similar applications in recent cases continued to grow, the ECtHR considered it reasonable to initiate the PJP for the first time in respect of Germany, in *Rumpf*.[886] Rüdiger Rumpf, who operated a personal security service, having unsuccessfully lodged appeals with national courts against the decision of the Querfurt county authorities not to renew his gun licences,[887] appealed to the FCC alleging a violation of Article 6 ECHR due to lengthy proceedings and the absence of legal remedy under German law. By the time the FCC delivered its final decision on 25 April 2007, finding the complaint inadmissible,[888] the whole appeal process had lasted thirteen years.[889]

Rumpf turned to the ECtHR, invoking Articles 6(1) and 13 of the Convention, and the Court delivered its pilot judgment on 2 December 2010, acknowledging this violation of challenged provisions.[890] Setting a time-limit of one year for Germany to establish an effective domestic remedy, which would either expedite hearings in the national courts or provide adequate redress for delays, the ECtHR decided not to wait for the state to adopt the measures and continued to examine similar cases, to remind Germany of its obligations under the Convention.[891]

To implement the ECtHR's pilot judgment in *Rumpf*, Germany passed the Law 'On judicial remedies in court proceedings and criminal investigations of excessive length', which created a complaint procedure and guaranteed individuals the right to bring a claim for compensation.[892] Under Article 1 of the Law, the affected party can file an objection to procedural delay, and for each year of excessive duration of proceedings at the national level has a right to receive compensation if other reparation was not sufficient.[893]

885 *Rumpf* (n 43), para 68.
886 ibid [61],[69].
887 ibid [8]-[25].
888 BVerfG, 1 BvR 2398/05 (27 April 2006) cited in *Rumpf* (n 43), paras 28, 29.
889 *Rumpf* (n 43), para 37.
890 ibid [52].
891 ibid [73], [75].
892 Gesetz über den Rechtsschutz bei Überlangen Gerichtsverfahren und Strafrechtlichen Ermittlungsverfahren [Law On Judicial Remedies in Court Proceedings and Criminal Investigations of Excessive Length] 24 November 2011, BGBl 1, 2011, 2302.
893 ibid, art 1.

The Report on the application of a new regulation provided by the German government for the period 3 December 2011 to 31 December 2013 indicates that only a few complaints of delay and claims for compensation have been raised before the domestic courts since its entry into force,[894] which might confirm that the structural problem of lengthy proceedings in Germany no longer presents a major challenge.

The Report on the execution of judgment in *Rumpf*, issued by the Federal Ministry of Justice of Germany in 2013,[895] provides information on the measures adopted by national authorities for complying with their Convention obligations and illustrates the effects of the new legislative act on the national legal order. It was evident that it strengthened the legal protection of individuals before the domestic courts insofar as the length of judicial proceedings in Germany had been shortened, and so the Committee of Ministers closed the examination of *Rumpf* case in its Resolution adopted on 5 December 2013, stating that the respondent state had removed the deficiencies in its judicial system and established an appropriate legal remedy within the time indicated in the pilot judgment.[896] No other ECtHR judgment acknowledging a violation on the same grounds has subsequently been delivered.[897]

As a member of the international community, Germany strives to comply diligently with its obligations under Convention by adopting measures required by the ECtHR for the effective implementation of its judgments, and also attaches considerable attention to the judicial practice of the Strasbourg Court in the draft process or for amending a law under consideration. [898] This explicitly indicates that Germany takes its participation in the Convention mechanism seriously, and other states should undoubtedly follow its example.

3.3.3 *Burdov v Russia (no 2)*

In comparison with Germany, the Russian authorities have shown some reluctance to fully incorporate the norms of the Convention into its national legal system, or to comply with the

894 Erfahrungsbericht über die Anwendung des Gesetzes über den Rechtsschutz bei Überlangen Gerichtsverfahren und Strafrechtlichen Ermittlungsverfahren (Berichtszeitraum: 3. Dezember 2011 bis 31. Dezember 2013 [Experience Report on the Application of the Law on Judicial Remedies in Court Proceedings and Criminal Investigations of Excessive Length (reporting period 3 December 2011 to 31 December 2013)] 18/2950, 17 October 2014.

895 Federal Ministry of Justice of the Federal Republic of Germany, Report on the Execution of the Judgment of the European Court of Human Rights delivered on 2 September 2010 in the case of Rumpf v Germany, 12 November 2013.

896 CM, Resolution on 71 cases against Germany Execution of the Judgments of the European Court of Human Rights, CM/ResDH(2013)244, 5 December 2013.

897 Statistics (n 48).

898 BVerfGE 111, 307 (n 443), paras 48, 51.

obligation under Article 46 of the Convention to implement the judgments of the ECtHR.[899] Chronic problems inherited from the Soviet era have had an immense impact,[900] and since the jurisdiction of the ECtHR was accepted by Russia in 1998 the applications from its citizens have composed the largest part of the ECtHR's caseload, and an extremely high number of judgments have been delivered by the ECtHR finding infringements of the right to a fair trial under Article 6(1) of the Convention and the right to property under Article 1 of Protocol No 1.[901]

In *Burdov v Russia*,[902] a case that concerned non-enforcement of domestic judicial decisions, the applicant was ordered by the military authorities to take part in emergency operations at the Chernobyl nuclear plant between October 1986 and January 1997, during which time he was exposed to radioactive emissions. On account of health problems, he was entitled to various social benefits that the state failed to pay.[903] Although some of his claims were satisfied, a number of decisions awarding the petitioner compensation remained unenforced.[904] Alleging a violation of Articles 6(1) of the Convention and Article 1 of Protocol No 1,[905] Burdov filed a complaint with the ECtHR, which delivered its judgment on 7 May 2002 upholding the claims.

In December 2004, the Committee of Ministers adopted a Resolution concerning the judgment in *Burdov*[906] which reflected on those individual and general measures that the Russian authorities had agreed to implement.[907] Regardless of improvements in the national legislation and judicial practices highlighted by the Committee of Ministers, the Memorandum of 4 June 2007[908] drew attention to the continuing failure of public authorities to ensure consistent execution of the domestic courts' decisions. Since this represented one of

899 Yulia Dernovsky, 'Overcoming Soviet Legacy: Non-Enforcement of the Judgments of the European Court of Human Rights by the Russian Judiciary' (2009) 17 Cardozo J Intl & Comp L 471, 475.
900 Kathryn Stoner-Weiss, *Resisting the State: Reform and Retrenchment in Post-Soviet Russia* (CUP 2006) 154-159.
901 ECtHR, Annual Report (2015) 199 <www.echr.coe.int/Documents/Annual_report_2015_ENG.pdf> accessed 17 January 2017.
902 *Burdov v Russia* ECHR 2002-III.
903 ibid [7].
904 ibid [28].
905 ibid [38], [42].
906 CM, Resolution concerning the judgment of the European Court of Human Rights of 7 May 2002 (final on 4 September 2002) in the case of Burdov against the Russian Federation, ResDH(2004)85, 22 December 2004.
907 ibid, Appendix (b) to Resolution ResDH(2004)85 information provided by the Government of the Russian Federation during the examination of the Burdov case by the Committee of Ministers.
908 CM, Memorandum on non-enforcement of domestic decisions in Russia: general measures to comply with the European Court's judgments, CM/Inf/DH(2006) 4 June 2007.

the most fundamental systematic problems being encountered,[909] PACE urged Russia to resolve the issue of extensive non-enforcement of judicial decisions rendered against the state by assigning it a 'top political priority', because the existence of such structural deficiency caused repeated violations of the Convention and could pose a serious danger to the rule of law.[910]

The ECtHR, recognising the need to provide immediate redress for such persistent violations, applied a PJP in *Burdov v Russia (no 2)* in 2009.[911] In addition to breaches of Article 6(1), Article 1 of Protocol No 1, there were numerous breaches of Article 13, due to the lack of effective domestic remedies in the national legal system.[912] The ECtHR set a time-limit of six-months, within which the remedial measure should be introduced, and one year in which to provide redress to all petitioners with similar cases pending before the ECtHR.[913] The Court also decided to adjourn the consideration of clone cases for one year pending the adoption of the required measures.[914] However, the Russian government did not meet those time frames, and the Committee of Ministers issued an Interim Resolution on execution of judgments of the ECtHR in 145 cases against the Russian Federation.[915] This Resolution, while noting the positive developments in resolving the underlying problem, called on the Russian authorities to continue the implementation of legislative reforms to guarantee timely and effective execution of judicial decisions.

To avoid being accused of systematic non-compliance with the ECtHR's decisions, which might eventually lead to suspension of the membership in the CoE, the Russian Parliament passed two Federal laws 'On compensation for violation of the right to trial within a reasonable time or the right to enforcement of a judgment within a reasonable time'[916] and

909 CM, Non-enforcement of court decisions against the state and its entities in the Russian Federation: remaining problems and solutions required: conclusions of the round table of 30-31 October 2006 and Press Release, CM/Inf/DH(2006)45, 1 December 2006.

910 PACE, Resolution on implementation of judgments of the European Court of Human Rights, Res1516(2006), 2 October 2006, paras 10.2, 22.5.

911 *Burdov (no 2)* (n 820), paras 130, 134.

912 ibid [86], [87], [117].

913 ibid [141], [145].

914 ibid [142], [146].

915 CM, Interim Resolution on execution of the judgments of the European Court of Human Rights in 145 cases against the Russian Federation relative to the failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy, CM/ResDH(2009)43, 19 March 2009; CM, Interim Resolution on the execution of the pilot judgement of the European Court of Human Rights in the case Burdov No 2 against the Russian Federation relative to the failure or serious delay in abiding by Final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy, CM/ResDH(2009)158, 3 December 2009.

916 Federal Law N68-FZ 'O Kompensatzii za Narushenie Prava na Sudoproizvodstvo v Razumnii Srok ili

'On amendments to certain legislative acts of the Russian Federation'[917] which entered into force on 4 May 2010 and were intended to entitle the party to bring an appeal for compensation for non-enforcement or delayed enforcement of the courts' decisions.

Under the Compensation Act, a monetary award for a breach of the right to a trial or to enforcemenrt of a judgment within a reasonable time does not depend on whether this is the fault of the public authorities responsible.[918] The Plenum of the Supreme Court of the Russian Federation, in its Resolution N11 of 29 March 2016, clarified that a petitioner who appeals to the court for the compensation is not required to prove damage, as once the alleged violation is established, the cause of such damage will be presumed.[919] Although the new federal legislation reduced the number of similar claims forwarded to the ECtHR, it did not meet all expectations, as it only allowed compensation for a violation of the right to enforce judicial acts ordering monetary payments to be recovered from the federal budget of the Russian Federation, but not others, which the state was obliged to perform in kind.[920] The Supreme Court also confirmed that the Compensation Act could be applied only with respect to financial awards;[921] in all other cases there was still a lack of any effective remedy at the domestic level.

In 2012 it became obvious that the adoption of these Acts did not address the systemic failure to enforce non-monetary awards[922] and the ECtHR urged Russian officials to address this

Prava na Ispolnenie Sudebnogo Akta v Razumnii Srok' 30 April 2010 // RG N5173, 4 May 2010 (Compensation Act).

917 Federal Law N69-FZ 'O Vnesenii Izmenenii v Otdelnie Zakonodatelnie Akti Rossiskoi Federatzii v Svyazi s Prinyatiem Federalnogo Zakona ''O Kompensatzii za Narushenie Prava na Sudoproizvodstvo v Razumnii Srok ili Prava na Ispolnenie Sudebnogo Akta v Razumnii Srok'' [On Amendments to Certain Legislative Acts of the Russian Federation in Connection with Adoption of Federal Law ''On Compensation For the Violation of the Right to Trial within a Reasonable Time or Right to the Execution of a Judicial Act within a Reasonable Time''] 30 April 2010 // RG N94, 4 May 2010.

918 Compensation Act (n 916), art 1(3), art 1 (2).

919 Plenum of the Supreme Court of the Russian Fedeation, Resolution N11 of 29 March 2016 'O Nekotorih Voprosah, Voznikshih pri Rassmotrenii Del o Prisuzhdenii Kompensatzii za Narushenie Prava na Sudoproizvodstvo v Razumnii Srok ili Prava na Ispolnenie Sudebnogo Akta v Razumnii Srok' [On Certain Matters Arising in Proceedings on Compensation for Violation of the Right to Trial within a Reasonable Time, or Right for the Execution of a Judicial Act within a Reasonable Time] // RG N6940 (72), 6 April 2016, para 40 subpara 2.

920 CM, Communication from the Russian Federation concerning the case of Gerasimov and others against the Russian Federation (App no 29920/05) 24 July 2015 'Action Plan on execution of the pilot judgment of the European Court of Human Rights in case no 29920/05 Gerasimov and others v Russia (judgment of 1 July 2014, final on 1 October 2014)' DH-DD(2015)772, 17 July 2015, para 4.2 subpara 3.

921 Plenum of Supreme Court Resolution N11 of 29 March 2016 (n 919), para 2.

922 CM, Interim Resolution on execution of the judgment of the European Court of Human Rights: Burdov no 2 Against the Russian Federation regarding failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy, CM/ResDH(2011)293, 2 December 2011.

persistent problem to prevent a further influx of analogous applications to the Court, and informed them that it was initiating the PJP in another group of cases.[923]

Having observed that the Compensation Act did not cover the complaints of the fresh applicants, the ECtHR affirmed in *Gerasimov and Others v Russia* that structural dysfunction was leading to infringement of rights under Articles 6 and 13 ECHR and Article 1 of Protocol No 1, and called on Russia to ensure that within one year individuals were provided with an effective domestic remedy.[924] It was presumed that this time-limit would be adequate in light of the previous experience with enforcing the first pilot judgment in *Burdov v Russia (no 2)*. The examination of new similar applications was adjourned for a period of two years pending the adoption of a remedy.[925] The ECtHR obliged the respondent state to grant compensation within two years for delays in execution of judicial decisions imposing obligations in kind in respect of applicants who had lodged their complaints with the ECtHR before the present pilot judgment was delivered.[926]

In July 2015, the Russian authorities submitted a detailed action plan on the enforcement of pilot judgment in *Gerasimov*.[927] This plan reflected the individual and general measures taken to comply with the recommendations of the ECtHR, among which was a draft Federal law prepared by the Ministry of Justice of the Russian Federation, which was submitted to the Duma in November 2015.[928] Given that the draft law foresees that the Compensation Act and the changes introduced to other legislative acts have to be applied to cases dealing with enforcement of judgments imposing obligations in kind, it would apparently strengthen the responsibility of the authorities to solve the structural problem at the national level.[929]

It should be stressed, however, that even if national authorities are likely to change the legislation within the required time, it is not always possible to enhance their adherence to

923 *Gerasimov and Others v Russia* [2014] ECHR 680, paras 77, 134.
924 ibid [137], [213], [218], [226].
925 ibid [221], [229], [232].
926 ibid [231].
927 CM, Secretariat General, DH-DD(2015)772 'Communication from the Russian Federation concerning the case of Gerasimov and others against the Russian Federation (App No 29920/05) 24 July 2015.
928 Draft Federal Law N1027679-6 'O Vnesenii Izmenenii v Federalnii Zakon ''O Kompensatzii za Narushenie Prava na Sudoproizvostvo v Razumnii Srok ili Prava na Ispolnenie Sudebnogo Akta v Razumnii Srok'' v chasti Prosizhdeniya Kompensatzii za Narushenie Prava na Ispolnenie v Razumnii Srok Sudebnogo Akta, Predusmatrivayuwego Ispolnenie Gosudarstvom Obyazatelstv v Nature' [On amendments to the Compensation Act (with regard to compensation for a violation of the right to enforcement within a reasonable time of judgments obliging authorities to fulfil claims of pecuniary and (or) non-pecuniary nature)].
929 CM, DH-DD(2015)772 (n 927), para 4.2 subpara 2.

obligations accepted under international law. This creates serious obstacles both to comprehensive enforcement of the ECtHR's judgments in the Russian Federation and to further adoption of necessary legislative reforms in its legal system, as indicated by the fact that the ECtHR continues to apply the PJP in respect of Russia.

The contracting parties to the Convention did not demonstrate their willingness to enforce the judgments of the ECtHR, particularly those in which the ECtHR has found systematic problems in their legal orders, against which it has applied a PJP. Even if the PJP can stimulate positive changes in the legal systems of states, and thus ease the workload of the ECtHR, there are serious implications for individuals whose rights will be at stake if the ECtHR decides to adjourn the consideration of identical applications. The parties to the Convention should therefore focus on ensuring effective judicial protection of fundamental rights at the national level to avoid numerous applications being submitted to the Strasbourg Court and reduce the likelihood of the ECtHR applying the PJP against them.

3.4 Ensuring effective functioning of the ECHR control mechanism

3.4.1 Improving the implementation of the ECtHR's judgments

The stability of the human rights protection system at the national and international levels is one of the important elements of the ECHR mechanism. Among the reforms aimed at increasing the effectiveness of the ECtHR's functioning, the PJP was intended to involve all parties to the Convention in sharing the burden of the backlog of the ECtHR with the domestic authorities,[930] as this study has illustrated with examples of the pilot judgments against Poland, Germany and Russia, in the light of which these countries made modifications to their national legislation, policies and legal practices to remove the cause of the problem.[931]

The main challenge in the process of implementation of pilot judgments can be to elicit an effective response from the state concerned within the specified time. Since the response must go beyond the analysis of the origin of the problem revealed by the ECtHR and include

930 Fribergh (n 798), para 41.

931 Valerio Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdovic Cases' (2007) 7 HRLR 396, 408, 409.

proposals for solving it, a permanent dialogue between the contracting party to the Convention and the ECtHR should be maintained. Given that the reliability of the national authorities in enforcing of the ECtHR's judgments is important, the government's attitude to the use of the PJP is scrutinised to find out whether the necessary corrective measures to address systematic problems could be undertaken.[932] Consultation between the ECtHR and the respondent state is vital; however, the latter does not have the right to reject the application of the PJP, as its consent is not required. The PJP will only be successful if states are willing and able to collaborate and engage in a dialogue on the adoption of the remedial measures required by the ECtHR; otherwise, their failure to respond to the pilot judgments would discredit the whole procedure.[933]

PACE pays close attention to structural problems in the legal systems of the ECHR member states that lead to repeteated violations of the Convention provisions.[934] Although the Committee of Ministers is the only body responsible for monitoring the execution of the ECtHR's judgments, it was argued that the role of PACE should also be reconsidered; a better interaction between these two institutions of the CoE could be beneficial, not only for the process of enforcement, but for strengthening the protection of fundamental rights.[935] A specialised group, under the Committee of Ministers should be established, which would supervise the execution of the pilot judgments, assess the promptness and sufficiency of the measures adopted and share best practices among the contracting parties in implementing pilot judgments.

Given that not all ECHR member states have been cooperative in fulfilling their Convention obligations and addressing the structural deficiencies in their legal systems, this had increased the workload of the ECtHR. It is thus important that states, firstly, identify the underlying cause of a systematic problem and remove it at the natonal level, and secondly, enhance the domestic judicial protection of individuals. Only then will the number of repetitive applications to the ECtHR be reduced, allowing the ECtHR to focus on more serious cases.[936] It appears that this would also be an indispensable precondition for abandoning the application of the PJP in the future.

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932 Rules of Court (n 791), Rule 61, art 2.
933 Leach and others (n 92) 174.
934 PACE, Res(2006)1516 (n 910).
935 Buyse (n 93) 1902.
936 Harmsen (n 822) 36.

To achieve this, national authorities would be expected to execute the ECtHR's judgments comprehensively, in terms of individual and general measures. In so doing, they will comply with the Recommendation of the Committee of Ministers of 12 May 2004 on the improvement of domestic remedies, which emphasised that all ECHR member states must ensure effective remedies in law and practice allowing individuals to obtain an adequate redress at the national level. It is therefore significant to build close cooperation between the ECtHR and the national courts, and to involve the executive and legislative branches in the implementation process insofar as either legislative amendments or even new regulations are to be introduced. Only their joint involvement in enforcing the ECtHR's decisions can bring about effective changes in national legal systems and exclude the possibility of dealing repeatedly with clone cases.

The adoption of specific rules to regulate the execution of judgments might help states in fulfilling their Convention obligations. However, in practice this is not always so, and Ukraine is an example of this. Given that from year to year it overwhelms the ECtHR with complaints from its citizens,[937] in 2006 a law was passed 'On implementation of judgments and application of the judicial practice of the ECtHR',[938] but, unfortunately, it did not produce the anticipated results, as it did not increase the responsiveness of state authorities to eliminating ECHR violations. According to the statistical information provided by the Committee of Ministers in its Annual Report 2014,[939] the number of cases against Ukraine pending before the ECtHR, including those concerning structural problems, continued to grow, and the number of judgments awaiting implementation was increasing. It seems thus, that the adoption of a law to confirm the state's commitment to European integration in matters of justice and the protection of human rights is not enough to secure correct functioning of the Convention mechanism and a comprehensive implementation of the ECtHR's judgments in the national legal order.[940] Effective responses to judgments of the Strasbourg Court will only be obtained if there is a strong political will to adhere to the Convention's standards and

937 ECtHR, Annual Report 2014 (n 355) 166.

938 Law of Ukraine N3477-IV 'O Vipolnenii Reshenii y Primenenii Praktiki Evropeiskogo Suda po Pravam Cheloveka' [On Implementation of the Judgments and Application of the Judicial Practice of the European Court of Human Rights] 23 February 2006 // Bull VR 2006, N30.

939 CM, 8th Annual Report 2014 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights', Appendix 1: 40, 45, 48; Appendix 2: 75 <http://www.coe.int/t/dghl/monitoring/execution/Documents/Publications_en.asp> accessed 15 September 2015.

940 CM, Interim Resolution on the execution of the judgments of the European Court of Human Rights in 232 Cases against Ukraine relative to the failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy, CM/ResDH(2008)1, 6 March 2008.

promote human rights-oriented policies.

Countries which take seriously their responsibilities under the Convention, and in which the legal culture of compliance with international law is high, do not need detailed regulation of the execution of the ECtHR's judgments. A large number of applications at the ECtHR from Russia and Ukraine, which shows the persistence of long-standing problems in their legal systems, does not necessarily have to be related to existing gaps in the legislation, but could be explained by a reserved attitude of national authorities to incorporating the Convention provisions into their legal systems that was considerably affected by the Soviet mentality.[941] Given that this resistance on the part of national judges to aligning their judicial practices with the ECtHR's interpretation of the ECHR undermines their credibility, individuals tend to seek the protection of their rights at the ECtHR. Helen Keller has observed that in Poland:

> 'in certain administrative areas a (post-) communist mentality prevails in the work place and the context and substance of human rights is not yet fully present in the daily life of many civil servants. This gives rise to mistrust of the Polish judiciary and administration and explains why many Poles place their hope to Strasbourg'.[942]

The example of the Russian Federation illustrated that at the very beginning the state had a strong incentive to become a member of the CoE and to join the European system for the protection of fundamental rights. However, once it was accepted, this initial willingness disappeared, and Russia was repeatedly called on by PACE[943] and the Committee of Ministers[944] to eliminate continuing violations of the Convention. Anton Burkov explained that the national courts did not take for granted their obligations under the ECHR, and basically attempted to convince the CoE that the Convention was applied; they did not rely on the ECHR standards when deciding cases, and in their decisions quite often only mentioned the Convention norms without specifying the article, or made a reference to the ECHR in isolation from the case-law of the ECtHR.[945] Georg Nolte argued that domestic courts 'rather

941 Nussberger (n 531) 650.

942 Keller, 'Reception of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in Poland and Switzerland' (n 826) 339.

943 PACE, Resolution on the human rights situation in the Chechen Republic, Res (2004)1403, 7 October 2004; PACE, Resolution on honouring the obligations and commitments by the Russian Federation, Res (2005) 1455, 22 June 2005.

944 CM, Annual Report 2010 on the supervision of the execution of judgments (April 2011) <www.coe.int/t/dghl/monitoring/execution/.../CM_annreport2010_en.pdf> accessed 19 October 2015.

945 Anton Burkov, 'How to Improve the Results of a Reluctant Player: The Case of Russia and the European Convention on Human Rights' in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism Into Strength* (Edward Elgar Publishing 2013) 156.

‘‘take colour’’ from their ‘‘national legal culture’’ when interpreting and applying a treaty, and do not refer to decisions from international courts and courts of other states parties in order to identify a ‘‘true autonomous international meaning’.[946]

To begin to address this, the Recommendation of the Committee of Ministers adopted on 12 May 2004 on the ECHR in university education and professional training[947] should be put into full effect. It invited member states of the ECHR to organise professional trainings for judges to facilitate a better incorporation of the Convention standards and the ECtHR’s case-law in the reasoning of the judgments rendered by domestic courts. When applying national law, it is important to ensure that national authorities take into account all the case-law of the ECtHR, not just that concerning their state. Doing so might assist them in preventing violations of the Convention provisions and reducing the number of complaints forwarded to the ECtHR.

Given that ‘the effectiveness of national remedies for violations of the Convention rights is itself a direct indicator of the effectiveness of the ECHR in national legal orders’,[948] there is an urgent need to ensure that domestic legal remedies are capable of effectively addressing alleged violations of Convention rights in the ECHR member states. This will undoubtedly have ‘quantitative and qualitative effects’ on the caseload of the ECtHR[949] as the more cases are resolved at the national level, the fewer will be submitted to the ECtHR. Leo Zwaak has commented that infringements of the ECHR first of all have to be redressed at ‘home’ and the ECtHR should be an ‘*ultimum remedium*’.[950]

It is therefore important to make sure that national judicial remedies are recognised by the ECtHR as effective enough that individuals may be required to exhaust them before lodging a complaint with it, but several uncertainties still remain regarding these in the context of Article 35(1) of the Convention. This study will address those that represent the greatest concern for the petitioners, as their applications to the ECtHR could be rejected as failing to meet the admissibility criteria because they either have not exhausted all available remedies at the national level, or they have invoked remedies which are not considered to be effective

946 Georg Nolte, ‘Introduction’ in Nolte and Aust (n 83) 3.
947 CM, Recommendation to member states on the European Convention on Human Rights in university education and professional training, Rec(2004)4, 12 May 2014, para 9.
948 Sweet and Keller, ‘The Reception of the ECHR in National Legal Orders’ (n 765) 24.
949 CM, Recommendation to member states on the improvement of domestic remedies, Rec(2004)6, 12 May 2004, para 3.
950 Leo Zwaak and Therese Cachia, ‘The European Court of Human Rights: A Success Story?’ (2004) 11(3) Human Rights Brief 32, 35.

from the perspective of the ECtHR. By scrutinising national judicial review proceedures in civil, arbitration and criminal cases, it will attempt to suggest how to increase the availability and effectiveness of domestic judicial remedies.

3.4.2 National judicial review procedures

In the interview on 'Preliminary results of the Constitutional Court's work on the threshold of the 15th anniversary', the Chairman of the RCC declared that to comply with the requirement of exhaustion of domestic remedies in the Russian legal system under Article 35(1) of the Convention it would be necessary to have recourse to the court of first instance and the court of cassation.[951] However, the key question whether supervisory review proceeding, with its numerous instances and uncertain terms of application, was also covered by the Convention provision remained open. The study will touch upon this problematic issue through examining the case law of the ECtHR.

3.4.2.1 Civil procedure

The first relevant discussions took place in 1999, when the ECtHR, in considering admissibility in *Tumilovich v Russia*, held that the supervisory review formed part of 'extraordinary remedies, the use of which depends on discretionary powers of the President of the Civil Chamber of the Supreme Court and the Deputy Prosecutor General'.[952] It was emphasised that, insofar as under Article 320 of the Civil Procedure Code of the RSFSR in force till 2002[953] the petitioner was not authorised to initiate legal proceedings in the supervisory instance independently, the effectiveness of such a remedy in the context of Article 35(1) of the Convention would be in doubt.[954]

On 8 February 2006, the Committee of Ministers adopted an Interim Resolution concerning violations of the principle of legal certainty through the supervisory review procedure in civil

951 Interview with Valery Zorkin, 'Predvaritelnie Itogi Deyatelnosti Konstitutzionnogo Suda RF na Poroge 15-letiya' [Preliminary Results of the Constitutional Court's Activity on the Threshold of the 15th Anniversary] (Consultant, 6 April 2006) <http://www.consultant.ru/law/interview/zorkin/> accessed 27 September 2015.
952 *Tumilovich v Russia*, App no 47033/99 (ECHR, 22 June 1999), para 1 s 'Law'.
953 GPK RSFSR [Civil Procedure Code of the RSFSR] 11 June 1964 // Vedomosti RSFSR 1964, N24, 407.
954 *Tumilovich* (n 952), s 'Law'.

proceedings in the Russian Federation.[955] It invited the Russian authorities to adopt, within one year, general measures that would: prevent further breaches of the legal certainty requirement; set stricter time-limits for lodging requests for a supervisory review; limit the number of successive applications that could be submitted in the same case for review; and narrow down admissible grounds to cover only the most serious violations of law. The legislature was called on to bring the legal regulation of the supervisory review in line with international legal standards recognised by the Russian Federation.[956]

In its Resolution N2-P of 5 February 2007, the RCC emphasised that if the judge suspends the execution of the appealed judicial decision, this act will not be implemented and available domestic remedies would not be deemed exhausted in the context of Article 46(3) of the Russian Constitution until the court of supervisory instance delivers its judgment.[957] Unlike the ECtHR, this Court is auhorised to revoke the decision of the court which led to the infringement. This would mean that individuals would be allowed to bring a case before the ECtHR only after proceedings at the Court are finished, presuming that as a result of subsequent reforms the supervisory review meets the requirement of an effective remedy.[958]

Considering this, substantial changes to the regulation of supervisory proceeding were made by Federal law N330-FZ that entered into force on 8 January 2008.[959] Among the amendments introduced to new Civil Procedure Code of the Russian Federation (GPK) enacted on 1 February 2003[960] were the following: the discretionary power of the Deputy President of the Supreme Court of the Russian Federation to overrule the decision of a judge of the Supreme Court on a refusal to submit an appeal for a supervisory review and to transfer this appeal for consideration in the supervisory review proceedings was abolished and in Article 376(2) GPK the time-limit of six-months for bringing an appeal to the court exercising supervisory jurisdiction by those participating in the procedure and those whose rights and legitimate interests were affected by judicial decisions was introduced. Despite the fact that in its

955 CM, Interim Resolution concerning violations of the principle of legal certainty through the supervisory review procedure (''Nadzor'') in civil proceedings in the Russian Federation - general measures adopted and outstanding issues, ResDH(2006)1, 8 February 2006.

956 RCC, Resolution N2-P of 5 February 2007 (n 543), para 9.2 subpara 7.

957 ibid, para 9.3 subpara 3.

958 ibid, para 9.3 subpara 4.

959 Federal Law N330-FZ 'O Vnesenii Izmenenii v Grazhdanskii Protzessualnii Kodeks Rossiskoi Federatzii' [On Amendments to the Code of Civil Procedure of the Russian Federation] 4 December 2007 // RG N4539, 8 December 2007.

960 Federal Law N138-FZ of 14 November 2002 'Grazhdanskii Protzessualnii Kodeks' // RG N220, 20 November 2002 (GPK); Federal Law N137-FZ 'O Vvedenii v Deistvie Grazhdanskogo Protzessualnogo Kodeksa Rossiskoi Federatzii' [On Enacting the Code of Civil Procedure of the Russian Federation] 14 November 2002 // RG N3088, 20 November 2002.

Resolution of 12 February 2008, the Supreme Court pointed out that established time-limit was to be applied for appealing judicial decisions in all courts of supervisory instances and was not subject to renewal when the application was submitted to a higher court of supervisory instance after a refusal to transfer a complaint for a supervisory review,[961] it was not clear how this would eventually be calculated by the Strasbourg Court.

Having proclaimed its jurisdiction to evaluate in every case the effectiveness of any presented remedies in terms of 'generally recognised rules of international law concerning the exhaustion of domestic remedies',[962] the ECtHR has been assessing the compliance of new rules with the requirement of Article 35(1).

Despite showing respect to the amendments made that considerably improved supervisory review proceeding, the ECtHR held in *Martynets v Russia* in 2009 that existing earlier uncertainty has maintained as the binding courts' decisions could be challenged in several consecutive supervisory review instances, which would make it difficult to determine the final point in domestic procedures.[963] It was therefore not possible to recognise this procedure as an effective remedy in the national legal system, and the applicant's complaint was rejected in accordance with Article 35(1) and (4) of the ECHR, as it was submitted six months after the date on which the decision of the court of cassation was delivered, which was considered final.

As a response to the ECtHR's concerns in respect of identified deficiencies in supervisory review proceeding, further changes were made in 2010 by Federal Law N353-FZ.[964] Instead of one cassation and three stages of supervisory review proceeding, it introduced the appelate instance, two level proceedings in cassation instance, which under Article 377 GPK require the appeal to be first brought to the Presidium of the Regional Court and thereafter to the Civil Chamber of the Supreme Court, and the supervisory review instance. By virtue of this reform,

961 Plenum of the Supreme Court of the Russian Federation, Resolution N2 of 12 February 2008 'O primenenii norm grazhdanskogo protzessualnogo zakonodatelstva v sude nadzornoi instancii v svyazi s prinyatiem y vvedeniem v deistvie Federalnogo Zakona ot 4 Dekabrya 2007 N330-FZ 'O Vnesenii Izmenenii v Grazhdanskii Protzessualnii Kodeks Rossiskoi Federatzii" [On the application of norms of civil procedural law in the court of supervisory instance in connection with the adoption and enaction of the Federal Law of 4 December 2007 N330-FZ 'On Amendments to the Code of Civil Procedure of the Russian Federation'] // RG N34, 16 February 2008, para 1 subpara 2.

962 *Berdzenishvili v Russia* [2004] ECHR 2004-II, s 'Law'.

963 *Martynets v Russia* App no 29612/09 (ECHR, 5 November 2009).

964 Federal Law N353-FZ 'O Vnesenii Izmenenii v Grazhdanskii Protzessualnii Kodeks Rossiskoi Federatzii' [On Amendments to the Civil Procedure Code of the Russian Federation] 9 December 2010 // RG N5360, 13 December 2010 (entered into force on 1 January 2012).

which entered into force on 1 January of 2012, the multiplicity of supervisory instances that was previously criticised by the ECtHR was removed and, pursuant to Article 391.1 GPK was limited to review of judicial decisions by the Presidium of the Supreme Court, which could accept such appeals after the Civil Chamber of the Supreme Court had examined them in cassation proceedings.[965] Given that within the frame of the supervisory review only one level proceeding remained and the time for lodging an appeal under Article 391.2(2) GPK was shortened by three months, there was no danger that the case would go through multiple instances over an indefinite period.

To evaluate how these changes affected the position of the ECtHR regarding the effectiveness of the amended cassation and supervisory review proceedings, the study will turn to the examination of recently delivered by the ECtHR judgment in *Abramyan and Yakubovskiye v Russia*.[966] The Strasbourg Court, having analysed the new cassation procedure that absorbed the first two stages of the supervisory proceeding, affirmed that the six-month time period for reviewing judicial decisions that had entered into force was supposed to cover now both levels of cassation procedure, as compared to the previous practice of applying this time-limit to appeals lodged at three supervisory review instances.[967] A Resolution of the Plenum of the Supreme Court 11 December 2012 stated that this time-limit would not be restarted after a cassation appeal was rejected and resubmitted to a higher cassation court.[968] Although the legal regulation did not clarify how to calculate this six-month time-limit if the party has the right to file two cassation appeals, it was observed that the new time-limit was diligently complied with by the courts and the proceedings at both cassation levels were terminated within one year.[969] Apart from the general six-month period envisaged for submitting both cassation appeals, the GPK has specified the time-limits for each stage of consideration in cassation proceedings, which would undoubtedly assist in identifying the final point in the procedure at the national level.

The GPK has similarly foreseen the possibility for the parties under Article 381(3) GPK to complain to the President or Deputy President of the Supreme Court after the dismissal of the

965 GPK (n 960), art 391.1, para 2 subpara 6.
966 *Abramyan and Yakubovskiye v Russia* [2015] ECHR 677.
967 ibid [51], [76].
968 Plenum of the Supreme Court of the Russian Federation, Resolution N29 of 11 December 2012 'O primenenii sudami norm grazhdanskogo protzessualnogo zakonodatelstva, reguliruyuwego proizvodstvo v sude kassatzionnoi instantzii' [On application by the courts of the norms of civil procedural law regulating the proceedings in the court of cassation instance] // RG N295, 21 December 2012, para 8.
969 *Abramyan* (n 966), paras 62, 79; GPK (n 960), art 386 (1).

cassation appeal by a single judge of the Supreme Court that are empowered to dismiss the ruling issued by a single judge and to transfer the cassation appeal for consideration to the court of cassation instance. Alternatively, the parties may request the President or Deputy President of the Supreme Court under Article 391.11 GPK to initiate supervisory review proceeding within six months of the date on which the challenged decision became binding. It must be emphasised that such a complaint, which was an integral part of the former supervisory review proceeding, is now recognised as separate from the cassation procedure remedy, the use of which depends on the discretionary powers of state officials and not subject to the exact time limitations, and so would not be taken into account in the context of Article 35(1) of the Convention.[970]

The ECtHR concluded that previous uncertainties in the supervisory review proceeding had been addressed by new cassation procedure;[971] having recognised it as a remedy that would have to be exhausted, the Court called on individuals to make extensive use of it before bringing their cases to the ECtHR.[972] Provided that the time-limits established by GPK are complied with and access to the Supreme Court is guaranteed, further successful functioning of the cassation appeal system will be ensured.[973] Using this approach, in according with which any alleged infringements of the Convention first dealt with at the domestic level through review by the highest judicial body of the Russian Federation, cooperation between the conventional mechanism and the Russian national judiciary will be enhanced.[974]

As far as supervisory review proceeding was concerned, the ECtHR stressed that, since it may be initiated only by the President or Deputy President of the Supreme Court and was thus subject to the power of public officials, this remedy was considered as an 'indirect, extraordinary remedy which remains outside the normal frame of domestic remedies'.[975] The legal stability might be preserved by profiting only from accessible legal remedies that could provide redress against any alleged violations of the Convention.[976] The Strasbourg Court has reaffirmed this approach in its recent judgment in *Kocherov and Sergeyeva v Russia*.[977] Given that supervisory review did not constitute an effective remedy for the purposes of Article

970 ibid [82], [37], [81].
971 ibid [83].
972 ibid [93].
973 ibid [95].
974 ibid [96].
975 ibid [102].
976 ibid [74]; *Akdivar and Others v Turkey* [1996] ECHR-IV, para 68.
977 *Kocherov and Sergeyeva v Russia* App no 16899/13 (ECHR 29 March 2016), para 66.

35(1) of the ECHR, the complainant's petition in the case was rejected as it exceeded the time-limit required for bringing the case before the ECtHR.[978]

Given that the court of the supervisory instance has overturned and modified a significant number of decisions of the lower courts, due to the erroneous application of law,[979] national authorities have to address the revealed by the Strasbourg Court deficiencies urgently, so that its effectiveness under Article 35(1) of the Convention may not be jeopardised. As long as this issue remains open, the time-limit of six-months will presumably be calculated without the possibility of lodging a supervisory appeal, which is not available for the applicants under GPK. It would be prudent to inform the Strasbourg Court about any outcome of such proceedings in order to strengthen the position of individuals before the ECtHR against any unpredictable conclusions.

3.4.2.2 Arbitration procedure

Following the reform introduced in 2012, the cassation and supervisory review proceedings in the courts of general jurisdiction were comparable to those already existing in arbitration courts. However, in contrast to the supervisory review proceeding regulated by GPK, which was not recognised by the ECtHR as an effective domestic remedy for the purposes of Article 35(1) of the Convention, the ECtHR has explicitly affirmed that both cassation and supervisory review as regulated by the Arbitration Procedure Code of the Russian Federation (APK) in force since 1 January 2003 [980] constituted remedies which did need to be exhausted.[981]

In *Glukhikh v Russia*,[982] the ECtHR recognised the Government's objections regarding non-exhaustion of domestic remedies as well-founded, concluding that the cassation appeal should have been lodged prior to bringing the case before the ECtHR in order to give the Russian courts a chance to address the alleged violation of the Convention first at the national level. The Court rejected the application under Article 35(1) ECHR for failing to make use of all available and effective legal remedies.

978 *Abramyan* (n 966), paras 74, 105.
979 RCC, Resolution N2-P of 5 February 2007 (n 578), para 9.2 subpara 5.
980 Arbitrazhnii Processualnii Kodeks N 95-FZ [Code of Arbitration Procedure of the Russian Federation] 24 July 2002 // RG N137, 27 July 2002 (APK).
981 *Abramyan* (n 966), para 60.
982 *Glukhikh v Russia*, App no 1867/04 (ECHR, 25 September 2008), para 1 s 'Law'.

In *Kovaleva and Others v Russia*,[983] the ECtHR emphasised that the supervisory review proceeding has been regulated in a detailed way by APK untill amended in June 2014; particularly in accordance with Article 292, an application for a review could be lodged with the Supreme Arbitration Court by the parties or certain other persons within a period not exceeding three months from the date of entry into force of the last contested judicial decision, if all other judicial remedies were exhausted. Article 304(2) APK limited the grounds for supervisory review and included among others a violation of human rights and freedoms guaranteed by international treaties of the Russian Federation.[984] Given that the binding judicial decisions could be challenged only in a single instance on the request of the party and within a limited period, the ECtHR concluded that the supervisory review was not considered as a separate, but as an ultimate domestic remedy within the meaning of Article 35(1) of the Convention.

As a result of amendments enacted in June 2014 by the Federal Law N186-FZ,[985] the Supreme Arbitration Court was superseded by the Supreme Court. The new regulation foresees now multiple stages of appealing judicial decisions in cassation instance. Decisions of Regional Arbitration Courts and of the Arbitration Courts of Appeal that have entered into force may be appealed within a period not exceeding two months from the date of their entry into force to Arbitration Courts of Districts, as set in Article 276(1) APK. The same judicial acts and the decisions of the Arbitration Courts of Districts can subsequently be challenged within two months, as stipulated by Article 291.2 APK, in cassation proceeding in the Civil Chamber of the Supreme Court of the Russian Federation (Article 291.1(1) APK). If the judge of the Supreme Court refuses to transfer a cassation appeal for consideration to the Civil Chamber, a third appeal within the frame of cassation proceedings is possible; it would need to be addressed to the President or Deputy President of the Supreme Court (Article 291.6(8) APK), who may dismiss the ruling issued by a judge of the Supreme Court and transfer the cassation appeal for consideration to the Civil Chamber. The time-limit for such an appeal was not prescribed by APK, but by analogy with the rules laid down by GPK, as interpreted by the Supreme Court, the two-months time-limit enshrined in Article 291.2(1) APK is likely to be common to both appeals.

983 *Kovaleva and Others v Russia*, App no 6025/09 (ECHR, 25 June 2009), para A s 'Law'.

984 Federal Law N25-FZ 'O Vnesenii Izmenenii v APK' [On amendments to APK] 31 March 2005 // RG N68, 05.04.2005.

985 Federal Law N 186-FZ 'O Vnesenii Izmenenii v Arbitrazhnii Kodeks Rossiskoi Federatzii' [On Amendments to the Code of Arbitration Procedure of the Russian Federation] 28 June 2014 // RG N148, 4 July 2014.

In accordance with Article 308.1 APK, the rulings of the Civil Chamber handed down in cassation proceedings could be reviewed within three months, on complaint of the persons participating and certain other persons affected, in the supervisory instance by the Presidium of the Supreme Court of the Russian Federation. In a case where the judge of the Supreme Court, on examination of the supervisory appeal, refuses to transfer it for consideration to the Presidium of the Supreme Court, the President or Deputy President of the Supreme Court under Article 308.4(7) APK could disagree with the ruling issued by a judge of the Supreme Court and hand over the case to the Presidium. A time-limit within which the President or Deputy President could exercise this power was not, however, established by APK. If this procedure may be viewed as a second supervisory appeal, then the single three-months period prescribed in Article 308.1(4) APK could be applied to it.

Apart from this, Article 308.10 APK secures the right of interested parties to file a complaint with the President or Deputy President of the Supreme Court to submit judicial decisions to the Presidium of the Supreme Court for a supervisory review to address fundamental violations of substantive law or procedural law which affect the legality of the contested judicial decisions. Article 308.10(4) APK established a time-limit for lodging this complaint of four months from the date when the challenged judicial decision came into force. One might assume that such a separate stage of consideration of the complaint within the frame of supervisory review could either be an alternative to the avenue of appeal to the President or Deputy President of the Supreme Court under Article 308.4(7) APK, or might even complement it.

Relying on the past practice of the ECtHR, it may be that the renewed cassation procedure would be recognised as an effective remedy within the meaning of Article 35(1) of the Convention. However, given that the analysed amendments to APK introduced a multistage system of revision of judicial acts within the frame of cassation and supervisory proceedings, the Strasbourg Court may question the effectiveness of these remedies as a whole without dividing them into separate stages. The major concern of the ECtHR may be the exercise of discretionary power by the President or Deputy President of the Supreme Court to revoke the decision of a judge of the Supreme Court to refuse to transfer the appeal for further consideration, which is not subject to any time-limits.

In view of remaining uncertainties, which may threaten the stability of the judicial practice, it

is thus important to regulate this problematic issue in order to avoid any arbitrary decisions. Since the ECtHR has not so far expressed its opinion on the effectiveness of new cassation and supervisory review proceedings in light of the 2014 amendments, it would be reasonable to calculate six-month period without considering the need to file cassation and supervisory appeals, but nevertheless it is advisable to submit them and to report to the ECtHR on the results of such proceedings. If the ECtHR acknowledges these procedures in whole or in part as effective remedies, this might help meet the time-limit established by the Convention, and make use of all available domestic remedies as required by Article 35(1) ECHR.

3.4.2.3 Criminal procedure

As observed in *Berdzenishvili v Russia,* the supervisory review of judicial decisions in criminal proceedings under the Criminal Procedure Code of the Russian Federation (UPK) that came in force on 1 July 2002[986] was not recognised by the ECtHR as an effective domestic remedy that had to be exhausted in terms of Article 35(1) of the Convention.[987] The Strasbourg Court justified its position by stating that pursuant to the rules set out in Chapters 48 UPK, which was repealed when Federal law N433-FZ[988] entered into force, applications for a supervisory review could be brought at any time after the contested judicial decisions came into force, even years later. In view of this uncertainty about the time-limits for reviewing judicial decisions in the supervisory instance, the starting point for the calculation of the six-month time-limit was unclear. Apart from that, in accordance with Articles 401.8(3) and 412.5(3) UPK those specific powers of the President or Deputy President of the Supreme Court to overrule the decision of the judge to refuse to transfer the complaint to a supervisory review court, regarding which the ECtHR expressed its discontent, were sustained and not restricted by time constraints.

From 11 January 2015 when Federal Law N518-FZ,[989] which amended Articles 401.2 and

986 Federal Law N174-FZ 'Ugolovno-Protzessualnii Kodeks Rossiskoi Federatzii' [Code of Criminal Procedure of the Russian Federation] 18 December 2001 // RG N249, 22 December 2001.

987 *Berdzenishvili* (n 962), s 'Law'.

988 Federal Law N433-FZ 'O Vnesenii Izmenenii v Ugolovno-Protzessualnii Kodeks Rossiskoi Federatzii y Priznanii Utrativshimi Silu Otdelnih Zakonodatelnih Aktov (Polozhenii Zakonodatelnih Aktov) Rossiskoi Federatzii' [On Amendments to the Code of Criminal Procedure of the Russian Federation and the Annulment of Certain Legislative Acts (Provisions of Legislative Acts) of the Russian Federation] 29 December 2010 // RG N5376 (297), 31 December 2010.

989 Federal Law N518-FZ 'O Vnesenii Izmenenii v Statyi 401.2 y 412.2 Ugolovno-Protzessualnogo Kodeksa Rossiskoi Federatzii y Priznanii Utrativshimi Silu Otdelnih Polozhenii Zakonodatelnih Aktov Rossiskoi Federatzii' [On Amendments to Articles 401.2 and 412.2 of the Criminal Procedure Code of the Russian

412.2 UPK, entered into force, the time-limit of one year for lodging cassation and supervisory appeals after contested judicial decisions became final was abolished. Given that this may undermine the principle of legal certainty, the probability that the ECtHR would recognise these procedures as effective domestic remedies for the purposes of Article 35(1) of the Convention is low.

In *Kashlan v Russia* of 19 April 2016, the ECtHR evaluated the effectivenesss of renewed cassation proceeding.[990] Having emphasised that by removing the time-limit for lodging cassation appeals the binding judicial acts could be challenged for an indefinite period, the ECtHR came to the conclusion that the cassation procedure as amended in 2014 did not represent an effective legal remedy that had to be exhausted before filing a complaint with this Court.[991] It seems thus that the Strasbourg Court will similarly not recognise the new supervisory review as an effective remedy for the purposes of Article 35(1) of the ECHR, and so applicants should lodge their complaints with the ECtHR without awaiting the outcome of these proceedings.

3.4.3 Constitutional complaint mechanism

The experience of other contracting parties to the Convention, for instance Spain[992] and the Federal Republic of Germany,[993] has demonstrated that granting access to the courts that are empowered to exercise constitutional review considerably increases public trust in the national judicial system. Gerhard Dannemann has argued persuasively that the availability of the judicial remedy of a constitutional complaint in domestic legal systems 'leads to a better observation of constitutional rights by the legislature, executive and judiciary', and 'marks an important step in the protection of human rights'.[994]

According to the statistics provided by the ECtHR, the number of adverse decisions rendered by the ECtHR in respect of Spain since its jurisdiction was accepted in 1979 is very low,

Federation and Declaring Invalid Certain Provisions of Legislative Acts of the Russian Federation] 31 December 2014 // RG N1, 12 January 2015.

990 *Kashlan v Russia* App no 60189/15 (ECHR, 19 April 2016).

991 ibid, para 29 s 'Law'.

992 *Castells v Spain* (1992) Series A 236, paras 24-32.

993 *X v Germany* App No 8499/79 (Commission Decision, 7 October 1980).

994 Gerhard Dannemann, 'Constitutional Complaints: The European Perspective' (1994) 43(1) Intl & Comp LQ 142, 144, 152.

which could be explained by the effective functioning of the domestic judicial system for the protection of fundamental rights.[995] Mercedes Candela Soriano observes that since Italy does not provide a legal remedy equal to that of the Spanish *amparo* appeal that empowers the Spanish Constitutional Court to address alleged violations of fundamental rights embedded in the Spanish Constitution [996] prior to submission of applications by individuals to the Strasbourg Court, the number of complaints brought against it at the ECtHR has been greater.[997]

In Germany, the constitutional complaint procedure, as accentuated by Sebastian Müller and Christoph Gusy, is very popular and, due to the FCC's broad competences, it forms a powerful mechanism and the majority of violations of human rights are redressed at the national level.[998] A comparatively small number of adverse judgments handed down by the Strasbourg Court in respect of Germany was seen 'as a direct corollary of the FCC's individual complaint procedure'.[999] According to the statistical data provided by the FCC for the period between 17 September 1951 and 31 December 2015, the total number of constitutional complaints was 209,374, of which 4,872 were successful.[1000] In 2015 alone, of 5,884 constitutional complaints submitted to the FCC, 111 were successful.[1001]

Under Article 93(1) [4a] of the Basic Law and Article 90(1) of the Law 'On the FCC' any individual may lodge a constitutional complaint with the FCC to verify whether the act of a public authority, which might be a judgment of a court, a legislation or an administrative act, complies with the provisions of the Basic Law. A complaint against a judicial decision must be submitted to the FCC within one month of the receipt of the decision,[1002] after other remedies available in the domestic legal system have been exhausted.[1003]

Given that the FCC may overturn decisions of the courts based on an unconstitutional law and

995 Statistics (n 48); J A Carrillo Salcedo, 'The International Dimension of Human Rights During the Political Transition in Spain' (1991) 1 Spanish YB Intl L 8-9.
996 Constitución Española [Spanish Constitution] 29 December 1978, BOE no 311-1.
997 Mercedes Candela Soriano, 'The Reception Process in Spain and Italy' in Sweet and Keller (n 65) 396, 397.
998 Müller (n 30) 29, 43.
999 ibid 30.
1000 FCC, Annual Statistics (2015) 4 <http://www.bundesverfassungsgericht.de/EN/Verfahren/Jahresstatistiken/2015/statistik_2015_node.html > accessed 24 October 2016.
1001 ibid 20.
1002 BVerfGG (n 124), art 93 (1).
1003 ibid, art 90 (2).

has the power to quash those legal acts,[1004] it has been argued that 'a single person can alter domestic legislation through a constitutional complaint'.[1005] Thus, the FCC, by guaranteeing individuals the possibility of restoring constitutional rights at the national level, considerably reduces the need to take cases to the ECtHR. However, in constitutional systems such as those of Russia and Poland, which do not make such an effective domestic legal remedy as a direct constitutional complaint procedure available to their citizens, their access to this powerful judicial institution for the protection of human rights is still restricted. Due to remaining constraints on the object of a constitutional complaint, the position of the applicants in constitutional proceedings is weak, as will be discussed below.

The RCC, established in 1994, has proved to be an effective mechanism for improving the national legislation and securing protection of constitutional rights of individuals.[1006] In accordance with Article 125 of the Russian Constitution and Article 3(1) FKZ 'On the RCC', the Court, as a body of constitutional control, is empowered to resolve questions of the conformity of federal legislation and certain other normative acts with the Constitution. Given that the decisions of the courts are not listed among the acts of which the constitutionality could be verified, individuals are only granted the right to lodge an appeal with the RCC pursuant to Article 96 FKZ 'On the RCC' alleging a violation of constitutional rights and freedoms by the legal act that was applied in a particular case. This has to be filed within one year of the decision being issued, as stipulated in Article 97 FKZ 'On the RCC'. Having accepted the complaint for consideration, the RCC notifies the court that applied the contested legal act in its decision and the body executing the court's decision, which might suspend its execution until the RCC hands down its ruling.[1007] Under Article 87 FKZ 'On the RCC', the challenged law or its provisions if recognised unconstitutional, will be repealed, and the case will be subject to review by the competent authority.[1008]

The mere fact that a law does not comply with an international treaty of the Russian Federation that has come into force does not provide the basis for acceptance of the request for a constitutional judicial review, as the RCC is only authorised to examine the constitutionality of international treaties of the Russian Federation prior to their entry into

1004 ibid, art 95 (2), (3).
1005 Müller and Gusy (n 30) 30.
1006 See, eg, Alexei Trochev, *Judging Russia: Constitutional Court in Russian Politics, 1990-2006* (CUP 2008).
1007 BVerfGG (n 124), art 98.
1008 ibid, art 100 subpara 2.

legal force.[1009] Therefore, verification of compliance with international obligations of the Russian Federation does not fall within the competence of the RCC.[1010]

In *Tumilovich* the ECtHR pointed out that a refusal by the RCC to accept the case for consideration, due to a lack of competence, was not relevant for determining the jurisdiction of the ECtHR.[1011] That part of the application was outside of the ECtHR's *ratione personae* and in accordance with Article 35(4) of the Convention was rejected as not compatible with the provisions of the Convention.

Since it has not so far been clarified whether it is compulsory to have recourse to the RCC before lodging complaints with the ECtHR, the effectiveness of this legal remedy in the context of Article 35(1) of the Convention remains to be determined. In approaching this issue, the RCC has declared in its Resolution N6-O of 13 January 2000 that in *Dudnik* the constitutional proceedings did not constitute one of the domestic legal remedies that must be exhausted before applying to international judicial bodies for the protection of human rights and freedoms.[1012] Apparently, this is why the provision of Article 79(1) FKZ 'On the RCC', stipulating that the decisions of the RCC are not subject to appeal, did not prevent individuals from having recourse to international judicial mechanisms.

No decision of the ECtHR has so far been found that would illuminate whether an appeal to the RCC was recognised as an effective remedy within the meaning of Article 35(1) of the Convention, although in *Lebedev v Russia*[1013] the ECtHR touched on this issue. In dismissing the Government's objection based on the non-exhaustion of domestic remedies, because the case was brought before the RCC which delivered its ruling in the applicant's favour on 22 March 2005,[1014] the ECtHR found that the declaration was made with a delay of almost four

1009 Russian Constitution (n 532), art 125 (2); FKZ 'On the RCC' (n 597), art 3(1).

1010 RCC, Resolution N139-O of 4 December 1997 'Ob otkaze v prinyatii k rassmotreniyu zaprosa Soveta Federatzii o porverke konstitutzionnosti Federalnogo Zakona 'O Perevodnom y Prostom Veksele' [On refusal to accept for consideration the request of the Federation Council for review of the constitutionality of the Federal Law 'A Bill of Exchange and Note'], para 4 subpara 2.

1011 *Tumilovich* (n 952), para 2.

1012 Resolution of the RCC N6-O of 13 January 2000 (n 601), para 5.

1013 *Lebedev v Russia* (2008) 47 EHRR 34.

1014 RCC, Resolution N4-P of 22 March 2005 'Po delu o proverke konstitutzionnosti ryada polozhenii Ugolovno-Processualnogo Kodeksa Rossiskoi Federatzii, reglamentiruyuwih poryadok y sroki primeneniya v kachestve meri presecheniya zaklyucheniya pod strazhu na stadiyah ugolovnogo sudoproizvodstva, sleduyuwih za okonchaniem predvaritelnogo rassledovaniya y napravleniem ugolovnogo dela v sud, v svyazi s zhalobami ryada grazhdan' [On verification of constitutionality of certain provisions of the Code of Criminal Procedure of the Russian Federation regulating the terms of application of detention as a preventive measure on the stages of criminal proceedings following the end of the preliminary investigation and transferring the criminal case to the court in connection with

months after the decision on the admissibility of the complaint was adopted.[1015] The ECtHR has clarified that the Government's concern that the case had not been yet resolved at the national level by the RCC could have been relevant, if the respondent state had raised the plea of non-exhaustion in the interests of the proper administration of justice from the very beginning.[1016] This has left open the question of whether recourse to the RCC, at least in some circumstances, is deemed to be an effective remedy in the context of Article 35(1) of the Convention.

In much the same way as in the Russian legal system, it is stipulated in Article 79 of the Polish Constitution that:

> 'everybody whose constitutional freedoms and rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution'.

Pursuant to Article 47.1 of the Constitutional Tribunal Act,[1017] individual's complaint alleging the unconstitutionality of a domestic legal act may be lodged within three months of the date when the final judgment was obtained, after all national legal remedies have been exhausted. Under Article 190 of the Polish Constitution, if the Constitutional Tribunal finds that the statutory provision which constituted the basis for the final judicial decision is unconstitutional, it will be repealed, and individual will be provided with a right to request the Constitutional Tribunal enable reopening of the procedure or revise it. However, since individuals cannot directly claim before the Polish Constitutional Tribunal that a decision of the court has infringed their constitutional rights, this considerably restricts their access to constitutional justice in Poland.

Given that only 'available remedies', which are 'accessible, capable of providing redress in respect of the applicant's complaints' should be exhausted in order to meet the requirement of Article 35(1) of the Convention,[1018] the ECtHR held in *Szott-Medyńska and Others v Poland* that the constitutional review proceeding would be recognised as an effective remedy for the purposes of the Convention in a situation where the challenged decision of the court had

complaints of a number of citizens] // RG N3735, 1 April 2005.

1015 *Lebedev* (n 1013), para 38.

1016 ibid [39]-[40].

1017 Ustawa o Trybunale Konstytucyjnym [Constitutional Tribunal Act] 22 July 2016, DzU poz 1157.

1018 *Abramyan* (n 966), para 74

directly applied the unconstitutional norm of the national legislation, and where procedural legislation provided for the possibility of either reopening of the case or overturning it based on the judgment delivered by the Constitutional Tribunal.[1019] The ECtHR has made it clear that the possibility exists that the constitutional appeal can be recognised as an effective remedy in the Polish legal system in the context of Article 35(1) of the Convention. It is thus significant to address remaining limitations on lodging a constitutional complaint in order to guarantee to Polish citizens that their applications to the ECtHR will not be rejected for the reason of non-exhaustion of available domestic legal remedies.

As long as access of individuals to constitutional justice in Poland is obstructed, the constitutional complaint procedure will obviously continue to be less popular and effective than in Germany,[1020] which may explain the increasing number of applications against Poland submitted to the ECtHR. As Gerhard Dannemann has argued, 'limiting constitutional complaints would simply shift the workload from national courts' to the ECtHR,[1021] and so it is of great importance to strengthen the functioning of the constitutional complaint mechanism in all those countries where individuals still lack access to such a 'highly effective means of legal protection of fundamental rights and freedoms'.[1022] That lessons should be learned from the best practices of the contracting parties to the Convention that have managed to secure applicants' right to lodge complaints with the courts having the power of constitutional review not only against the statute or any other normative act that can be questioned as unconstitutional, but also against judicial decisions where a violation of the Convention is alleged. This will undoubtedly improve the position of individuals in constitutional proceedings and grant petitioners an opportunity to seek redress for a violation of their fundamental rights first before domestic courts.

Given that there is no recognised legal practice requiring individuals to file a constitutional complaint before bringing a case to the ECtHR, applicants are recommended not to take into consideration the possibility of recourse to the courts exercising the power of constitutional review when they determine the six-month time-limit.

1019 *Szott-Medyńska and Others v Poland* App no 47414/99 (Decision as to the admissibility, 9 October 2003, not reported), s 'Law' (b).
1020 Krzyzanowska-Mierzewska (n 837) 73.
1021 Dannemann (n 994) 152.
1022 ibid 151.

3.5 Chapter summary

This chapter has examined the changing nature of the ECtHR's powers. It has discussed how, from the moment the ECtHR started applying the PJP in its jurisprudence, it became more constitutionalised. It was observed that in exercising its adjudicatory authority the Strasbourg Court went beyond the frame of consideration of individual case towards examining structural problems at the national level that were giving rise to the increasing number of repetitive cases at the ECtHR. The analysis of the process of implementation of pilot judgments in the legal systems of Poland, Germany and Russia has shown that, in cases where state authorities have demonstrated willingness to bring about the necessary changes to national legislation and administrative practices to meet the Convention standards, the PJP has had a positive effect on the resolution of persistent problems identified in domestic legal systems.

However, the legitimacy of the PJP being used in this way is still being questioned, as its application might undermine the sovereignty of the states and also limit individuals' right of access to the ECtHR, as guaranteed by Article 34 ECHR, pending the adoption of the required measures by the states to deal with systematic problems. It was suggested that the ECtHR, if it intends to apply this procedure more widely in the future, rethinks the approach it adopts for reducing the caseload of the Court.

The effective implementation of judgments of the Strasbourg Court is among the principal objectives of the Convention's control mechanism. Its principal purpose, which is to ensure compliance of member states with the ECHR guarantees, will not be achieved if the same type of violation continues to occur after a breach has been found. The chapter highlighted that the member states, as the main actors responsible for addressing and seeking long-lasting solutions to identified structural problems, should take the most active role in enforcing the judgments of the ECtHR to ease the backlog of cases and to achieve the best possible progress in the development of human rights standards.

Considering the examples of several contracting parties to the Convention, it was illustrated that there is an urgent need to improve the effectiveness of domestic judicial remedies in their legal systems as the remaining uncertainties in the legal regulation may have a destabilising effect on the protection of fundamental rights by domestic institutions. This would not only reassure individuals that violations of their fundamental rights could be redressed 'at home',

but would also minimise the negative consequences of the ECtHR being overloaded with complaints that indicate the existence of a systemic problem at the national level. Member states should rapidly address identified by the ECtHR deficiencies of domestic judicial review mechanisms and strengthen the position of individuals in constitutional proceedings in order to facilitate their access to justice.

Having established such filters, the protection of fundamental rights by means of domestic judicial institutions would be further enhanced and a large number of cases would be adjudicated at the national level. Governments would, firstly, prevent any intrusion into their legal orders by external judicial mechanism and, secondly, increase the responsibility of state officials arising from obligations that are accepted under international law. If successful, this would reinforce the national system of fundamental rights protection and decrease the probability of the ECtHR rendering new pilot judgments.

CONCLUSION

The analysis of the complex nature of the interactions between the ECtHR, the CJEU and the courts of the ECHR member states has revealed a lack of jurisdictional coordination between them that causes contradictions in their judicial practices. Since the resolution of the problem of jurisdictional competition has significant practical implications, it was the purpose of this study to contribute to improving the dialogue between these courts and to bridge the gap between the national, European and international judicial protection of fundamental rights. Having demonstrated the need to develop coherent approaches to reducing jurisdictional overlaps, this study has provided several suggestions as to how to avoid further tensions between these judicial actors operating in a multilevel system**.**

By examining judicial practices of the courts, this study arrived at the conclusion that a further search for balance in these interconnections is required: firstly, to tackle the jurisdictional conflicts that occur in the process of interaction between the CJEU and the courts of the member states; secondly, to harmonise the relationship between the CJEU and the ECtHR, particularly in light of the anticipated accession of the EU to the ECHR; and thirdly, to prevent new confrontations between the ECtHR and the courts of the ECHR member states and the problems that arise from the application of the PJP. These points will be briefly touched on again here.

As far as the partnership between the CJEU and the courts of the member states is concerned, the study has provided evidence of the competing jurisdiction of these judicial institutions in resolving disputes on fundamental rights. In striving to determine the perspectives of interactions between the CJEU and domestic courts, the author examined the mechanisms by which these courts control each other's increasing powers. The results have confirmed that, even if the state concerned has accepted in principle the supremacy of EU law, when the EU operates within the limits of its powers, the courts of the member states reserve the right to supervise the activities of EU institutions by conducting a review of EU legislation. If it was revealed that the competences of the EU were exceeded, the national courts would declare any EU *ultra vires* act inapplicable in the national legal system. The CJEU, in turn, also has a leverage over the national judiciary. As discussed within the context of *Köbler*, the Court has asserted that member states will be held liable for any actions of the domestic courts that were undertaken in breach of obligations originating from EU law, and will be obliged to compensate individuals who have suffered personal loss.

Despite such a restricted mode of cooperation, it has been demonstrated that a certain degree of convergence of judicial practices between these courts was achieved through the use of the preliminary ruling procedure, which contributed enormously to the consistent interpretation of EU law by the national judiciary and to the development of common standards on certain legal issues. There is no doubt as to its growing effect on the integration of EU legislation into the legal orders of member states. The domestic courts should make use of the preliminary ruling procedure in a more systematic and consistent way to secure the uniform application of EU law and to build a long-lasting partnership with the CJEU. If national courts when deciding cases involving EU law show willingness to recognise the principle of supremacy of EU law, the CJEU when adjudicating cases would be expected to attach due weight to the constitutional identities of the member states and to be more attentive to those solutions adopted at the national level by revising its own position when required. This will help to exclude potential contradictions between the courts and harmonise their relationship.

As regards the collaboration between the CJEU and the ECtHR, the study has revealed a sizeable expansion of the scope of the compulsory jurisdiction of the two courts. It has been argued that, since the creation of the EEC, the powers of the Court of Justice have been transformed to the extent that the focus has shifted from economic cases to fundamental rights issues. The study has highlighted that the changes introduced by the Lisbon Treaty have made tangible progress in coordinating cooperation between the courts, and have played a crucial role in ensuring effective protection of fundamental rights by these institutions. The key changes were, first, assigning the EUCFR the status of EU primary law and, second, providing a legal basis for the participation of the EU in the Convention mechanism. The continuous application by public authorities of the EUCFR, which in Article 52(3) made a considerable step towards promoting a peaceful relationship with the ECHR, taken in combination with the accession of the EU to the ECHR, would have a beneficial effect on the development of coherent approaches to the interpretation of fundamental rights by the CJEU and the ECtHR.

Having discussed several controversial provisions of the Accession Agreement, the author has argued that at this point it remains problematic to pursue this idea, unless the concerns of the CJEU expressed in Opinion 2/13 that the anticipated accession might affect the powers of EU institutions, are addressed through subsequent negotiations. It was emphasised that the distinctive nature of the EU legal system and competences of the CJEU and could be secured,

if the mechanism of prior involvement of the EU judicial mechanisms in the resolution of cases in which EU law matters are at issue is set up. This seems now even more feasible in view of the broad list of fundamental rights existing in the EU.

Emphasising the importance of moving towards deeper integration by overcoming these obstacles, the study presented possible scenarios of the interactions between the CJEU and the ECtHR, once the accession of the EU to the Convention is completed. Even if a sensible degree of judicial harmony in the relationship between the courts is already achieved through the application of the equivalent protection doctrine, it would not seem practical to take this approach further. Considering that the 'Bosphorus presumption', which for a long period contributed to maintaining a peaceful cooperation between the two regimes, is likely to be abandoned on the finalisation of the accession, in order to strengthen the protection of fundamental rights the EU would be expected to accede to the ECHR 'on an equal footing with the other contracting parties'.[1023]

Given that there could emerge the problem of concurrent jurisdiction between the courts, it was presumed that in such a case the CJEU, which is charged with the functions of interpreting EU acts and adjudicating on their validity, would hold in respect of the EU the same status as that of the national constitutional courts, and thus would sustain its role as a guarantor of the unity of the EU legal system. Otherwise, the hypothetical situation of a subordination between the courts would probably undermine the authority of the CJEU and the coherence of EU law. In any event, given the subsidiary character of the Convention system which does not allow it to intrude into the national legal orders of the contracting parties, any interference with the Union's autonomous legal order would similarly be excluded if a violation of the Convention's provisions is detected. Accordingly, it will fall within the scope of the discretion of the EU to select the proper ways of complying with the Convention's requirements and most efficiently implementing the judgments of the ECtHR in its legal order.

The problem of jurisdictional competition has also been revealed in the relationship between the ECtHR and the courts of the ECHR member states. The analysis of the effects of judgments of the ECtHR on the legal systems of Poland, Germany and Russia demonstrated that national authorities do not always entirely comply with their obligations under the

1023 Draft Explanatory Report (n 314), para 7 'Appendix V'.

Convention, which was the major reason for judicial conflicts that were emerging between the courts, particularly in those cases where the implementation of judgments of the ECtHR could run counter to the fundamental principles of the national legal orders. Member states, in reserving a power to block the execution of these judgments, will be strongly criticised by the ECtHR for a failure to adhere to obligations under the ECHR, and so this may bring into question the further participation of states in the Convention mechanism. Only if judicial institutions operate within the limits of the authority vested in them, will the constructive collaboration be achieved and further clashes between them are excluded.

It seems thus prudent to encourage the ECHR member states to properly translate their obligations under international treaty into domestic legal orders,[1024] and to coordinate their actions in accordance with the requirements of the ECHR. In bringing national legislation and practices in line with the Strasbourg case law, national authorities will not only demonstrate greater receptivity to the Convention, but also increase their trustworthiness. The ECtHR would then be expected to avoid any intrusion into states' sovereignty, attach considerable attention to national identities of the contracting parties to the Convention, and leave them sufficient discretion in balancing conflicting rights.

To pursue a healthy dialogue, the courts have to cooperate and 'learn how […] not just to co-exist', [1025] otherwise an increasing lack of mutual understanding between them might compromise the rule of law. It has been observed that since the contracting parties to the ECHR were not always willingly implementing judgments of the Strasbourg Court and reviewing their legal systems in light of its case law, the structrural problems in their legal orders became evident due to systematic non-compliance with the obligations under the ECHR, leading to a continuous flow of applications to the ECtHR. The absence of responses of the member states to the ECtHR's judgments could endanger the effective functioning of the Convention's control mechanism, and this has inspired the ECtHR to start using the PJP.

The examples of the impact of the pilot judgments on the national legal systems of Poland, Germany and Russia suggest that the application of the PJP has had a positive effect as it has encouraged member states to introduce amendments to the national legislation and initiate changes in judicial practices to resolve long-standing legal anomalies revealed by the ECtHR,

1024 Nolte (n 946) 5.

1025 Sonia Morano-Foadi and Stelios Andreadakis, 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence' (2011) 22(4) EJIL 1071, 1088.

and to avoid further violations of the ECHR. It has been argued that since the respondent states, in bearing primary responsibility for the protection of fundamental rights, are free to choose how to redress identified violations in their legal orders, the Strasbourg system of fundamental rights protection, which has a subsidiary character, is not authorised to prescribe to the state concerned what remedial measures are to be adopted at the national level to rectify systemic problems. National authorities have thus shown reluctance to adopt structural reforms recommended by the ECtHR to overcome complex obstacles to full compliance with their obligations under the Convention. It became evident that the PJP, as an instrument for coping with the high workload of the ECtHR, did not completely meet its expectations as this eventually led to an increased number of repetitive cases at the ECtHR.

Having highlighted that the application of the PJP in its current form could be detrimental to the sovereignty of states and to individuals' status before the ECtHR, an alternative approach to alleviating the ECtHR's burden of cases has been proposed, which is focused on improving the judicial protection of fundamental rights at the national level. If the contracting parties to the Convention address shortly revealed by the ECtHR deficiencies in the domestic judicial review procedures and strengthen the effectiveness of the constitutional complaint mechanism, which has proved to be one of the most efficient tools for securing the Convention rights, individuals will be assured that their rights and freedoms are properly guaranteed by their national judicial institutions. There has been successful experience of the constitutional complaint mechanism in states where individuals could exercise their right to appeal judicial decisions before the courts authorised to exercise constitutional review, and this should be transposed into those countries where several restrictions on their access to these courts still exist. By improving the position of the complainants in constitutional proceedings and allowing them to seek redress before the domestic courts, the number of cases brought to the ECtHR would be significantly reduced.

Even if certain patterns of conflict between the CJEU, the ECtHR and the courts of the ECHR member states could be seen, positive tendencies in their relationships were also clearly visible as these judicial institutions engage in a dialogue with each other to regulate their competing jurisdictions[1026] and sustain sufficient levels of convergence in interpretation of fundamental rights norms. Sabino Cassese argues that 'proliferation of national, supranational

1026 Tzanakopoulus (n 759) 74.

and global courts obliges judges to attend to their respective and reciprocal interaction'[1027] through adhering to best practices at different levels. This suggests that only by taking joint steps in this direction will the courts explicitly demonstrate their willingness to repress in certain cases their interests for the promotion of mutual understanding between them and overcoming new challenges in their interactions.[1028]

To ensure proper functioning of the examined judicial institutions and guarantee individuals effective protection of their fundamental rights it is important to deal with the problem of jurisdictional competition. The lack of coordination between the courts in Europe may risk undermining their credibility. In order to increase their legitimacy there must be a constant search for balance in judicial interactions, therefore it is vital to keep analysing the courts' judicial practices to determine how the process of mutual learning evolves and whether these judicial bodies take meaningful steps to further strengthen their cooperation. This apparently would require verifying whether, on the one hand, the warnings of the courts of the ECHR member states are duly taken into consideration by the CJEU and the ECtHR, and whether, on the other hand, the judgments of the European courts are given the corresponding value in the national legal systems, so that their fruitful long-term collaboration is guaranteed. Only if an open and respectful dialogue is maintained, will the protection of individuals be strengthened and potential jurisdictional conflicts between the courts are avoided.

1027 Sabino Cassese, 'The Constellation of Global and National Courts: Jurisdictional Redundancy and Interchange' in Anja Seibert-Fohr and Mark Villiger (eds), *Judgments of the European Court of Human Rights: Effects and Implementation* (Nomos 2014) 162.

1028 Fontanelli and Martinico (n 24) 89-91.

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The Netherlands

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